United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

United States Court of Appeals
For the
District of Columbia Circuit
FILED JUN 17 1958
Joseph W. Stewart
CLERK

JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,403

CLAYBORN E. BYNUM,

Appellant,

v.

67

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Washington, D. C. ROBERT I. THIEL Printer EX 3-0625

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JOINT APPENDIX

313 [Filed in Open Court Oct. 7, 1957]

THE UNITED STATES OF AMERICA	)	Criminal No. 924-57
vs.	)	Grand Jury No. 1064-57
CLAYBORNE BYNUM	)	Robbery (22-2901 D. C. Code)

The Grand Jury charges:

On or about August 6, 1957, within the District of Columbia, Clayborne Bynum by force and violence and against resistance and by sudden and stealthy seizure and snatching and by putting in fear, stole and took from the person and from the immediate actual possession of Edward N. Good property of Edward N. Good and Safeway Stores, Incorporated, a body corporate, of the value of about $1,634.00, consisting of the following: One automobile of the value of $1,500.00, one wallet of the value of $2.00 and $131.50 in money, property of Edward N. Good; one key of the value of $0.50, property of Safeway Stores, Incorporated, a body corporate.

/s/ Oliver Gasch
Attorney of the United States
in and for the District of Columbia

A TRUE BILL:

/s/ Richard R. Kaiser
Foreman.

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319 [Filed Feb. 20, 1958]

On this 14th day of February, 1958, came again the parties aforesaid, in manner as aforesaid, and the same jury as aforesaid in this cause, the hearing of which was respited yesterday; whereupon the said jury after hearing further of the evidence and instructions of the Court, alternate jurors Robert L. Farwell and Louis B. Gleason are discharged from further consideration in this case. The jury retires to consider their verdict.

The jury returns into Court and upon their oath say that the defendant is guilty as charged in the indictment.

The defendant is remanded to the District of Columbia Jail.

By direction of

/s/ Alexander Holtzoff
Presiding Judge
Criminal Court #3

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320 [Filed Feb. 19, 1958]

JUDGMENT AND COMMITMENT

On this 14th day of February, 1958 came the attorney for the government and the defendant appeared in person and by his counsel, H. L. Johnson, Esquire.

IT IS ADJUDGED that the defendant has been convicted upon his plea of not guilty and a verdict of guilty of the offense of Robbery, Violation Title 22 Section 2901, D. C. Code as charged and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Five (5) years to fifteen (15) years.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ Alexander Holtzoff
United States District Judge

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321 [Filed Feb. 24, 1958]

NOTICE OF APPEAL

Name and address of appellant: Clayborne Bynum
D. C. Jail

Name and address of appellant's attorney:
H. L. Johnson, Jr.

Offense: Robbery

Concise statement of judgment or order, giving date, and any sentence: Convicted of Robbery - sentenced on 2/14/58 to 5 to 15 years.

Name of institution where now confined, if not on bail:

D. C. Jail.

I, the above-named appellant, hereby appeal to the United States Court of Appeals for the District of Columbia Circuit from the above-stated judgment.

2/24/58
Date

/s/ Clayborne Bynum
Appellant

/s/ H. L. Johnson, Jr.
Attorney for Appellant

EXCERPTS OF TRANSCRIPT OF PROCEEDINGS

1 [Filed April 3, 1958]

February 11, 12, 1958

The above entitled matter came on for hearing before The HONORABLE ALEXANDER HOLTZOFF and a jury.

APPEARANCES:

For the Government:

Mr. Thomas A. Flannery

For the Defendant:

Mr. Henry Lincoln Johnson, Jr.

2 PROCEEDINGS

(Following the selection of a Jury and opening statements by counsel, the following proceedings were had in open court:)

MR. FLANNERY: Would you call Mr. Good, please?

Whereupon,

EDWARD N. GOOD

* * * * *

DIRECT EXAMINATION

BY MR. FLANNERY:

Q. Mr. Good, I want you to keep your voice up good and loud so every one can hear you.

State your full name. A. Edward N. Good.

Q. Mr. Good, where do you live? A. 5311 Third Street.

Q. Is that in Northwest, Washington? A. Northwest.

Q. In the District of Columbia? A. District of Columbia.

Q. Did you live there on August the 6th, 1957? A. I did, yes.

Q. Where are you employed now? A. With Safeway, at 6300

3 New Hampshire Avenue.

Q. Are you an assistant manager? A. Yes.

Q. How long have you worked for Safeway? A. 37 years.

Q. 37 years? A. Yes.

Q. On August 6th, 1957, were you employed as an assistant manager at the Safeway store at 6300 New Hampshire Avenue, Northeast? A. I was, yes.

Q. On that date, what time did you close your store? A. 9:00 p.m.

Q. Were you the last one to leave the store around 9 p.m.? A. I was; yes, sir.

Q. Now, before leaving the store around 9:00 p.m., being the last person in the store, did you have some duties to take care of? A. I had cash registers to take the money out of, and put it in the safe.

THE COURT: You are letting your voice go down. Speak like Mr. Flannery is speaking.

THE WITNESS: I put the cash in the safe and locked the safe.

3-a BY MR. FLANNERY:

Q. You locked the safe? A. Yes.

Q. And what else did you do? A. Then I went back in the back room and turned out all the lights.

Q. Were you the only one left in the store at that point? A. I was the only one there that night at the time.

Q. Now, after you put some cash in the safe and turned out the lights, what did you do then? A. Well, I proceeded to my car on the parking lot. I went out on the parking lot to get my car to go home. I had my groceries with me.

Q. Where was the parking lot with respect to the Safeway store? A. It adjoins between Eastern Avenue and the store.

Q. It adjoins the store? A. That's right.

Q. Where is the safe in the store? A. The safe is in the front of the store, right up at the front door.

THE COURT: May I inquire just where is 6300 New Hampshire Avenue?

BY MR. FLANNERY:

4 Q. Where is that? A. The next block beyond the Eastern Star Home, right across the line in Maryland.

Q. It is in Maryland right across the street from the District of Columbia? A. That's right, right across the District line.

Q. Now, can one look in the front window of the Safeway store and see the safe into which you put the money? A. No, you can't see the safe.

Q. You can't? A. No, it is right behind the front door.

Q. Is it possible to look through the Safeway window and see into the store from the outside? A. Oh, yes; you can see inside the store.

Q. Now, after leaving the store and going to the parking lot to get your car, what happened then? A. Well, I got in the car and was met by one of the clerks who warned me --

Q. Wait a minute, you can't repeat any conversation you might have had with this clerk, but what was the name of the clerk whom you met in the parking lot? A. Jenine Mennix.

Q. Did you have a conversation with her? A. Yes.

Q. Now, as a result of that conversation, did you see anything or
5 do anything? A. I didn't see anything.

Q. All right. Now, after the conversation with the clerk, what did you do then? A. I proceeded to go straight home down Eastern Avenue to Kansas Avenue to the front of my house at Third and Kansas Avenue.

Q. You crossed the line from Maryland into the District of Columbia? A. Right.

Q. And drove to your home? A. That's right.

Q. Now, where was your home? A. At 5311 Third, Northwest.

Q. In the District of Columbia? A. In the District of Columbia.

Q. Did you drive home alone? A. I did.

Q. Approximately what time did you arrive at your residence? A. Around quarter to ten or twenty to ten, something like that in the evening.

Q. Now, at that time did you have certain monies in your possession? A. I had my pay.

6 Q. Your pay? A. That's right.

Q. How much money did you have in your possession? A. I had around $85.

Q. Did you have any other money? A. Yes. I had a dollar fifty bill concealed in my wallet.

Q. You had your $85 pay? A. $85 pay.

Q. And in addition to that, did you have a dollar fifty bill? A. Yes, I had a dollar fifty bill.

Q. Is that a dollar fifty bill you carry in your wallet at all times? A. I have been carrying it all the time, yes.

Q. Now, you were driving your automobile, were you not? A. That's right.

Q. What was the value of your automobile? A. Approximately $1,500.

Q. What type of an automobile was it? A. 1955 four-door Mercury.

Q. And what was the license tag on your automobile? A. NK 732.

Q. Is that 1957 DC tags? A. Right.

7 Q. NK 732? A. That's right.

Q. Now, did you have a certain key belonging to Safeway store in your possession? A. I had the key to one of the doors, yes.

Q. One of the doors? A. Yes.

Q. Now, when you arrived at your residence, what did you do? A. Well, I was getting out of the car to lock up the car to go in the house, and my next door neighbor came out and spoke to me.

THE COURT: Please keep your voice up.

THE WITNESS: My next door neighbor came out of the door about the time I got out of the car door, and he and his wife got in their car, which was parked right behind me. His car was parked right behind my car, and as soon as he left --

BY MR. FLANNERY:

Q. As soon as your next door neighbor got in his car, he drove away? A. That's right.

Q. All right. Now, did you park your car right in front of your residence at 5311 Third Street? A. I did.

Q. All right. And after the neighbors drove away in their car,

8 what did you do then? A. Well, I was trying to lock the door, and this fellow come around and asked me directions to 6300 New Hampshire Avenue.

Q. A man came and asked you directions? A. That's right.

Q. Now, can you describe the man? A. Well, he was kind of short.

Q. Short? A. And it was dark, and I couldn't see the color. I thought it was a kind of a light-skinned colored person, but I just couldn't see because it was a dark street there, and the light across the street didn't shine over.

Q. You couldn't see well? A. That's right.

Q. Did you have a conversation with that man? A. Yes. He asked me the directions of 6300 Kansas Avenue, and I told him it was out about

10 blocks, but I didn't think there was any such address as 6300 New Hampshire Avenue -- or Kansas Avenue.

Q. Then what happened after that? A. Well, about that time my neighbor pulled off, and as he pulled off he come around and stuck a gun in me.

Q. The man you were talking to stuck a gun in you? A. Stuck a gun in me and said, "This is a stickup."

9 Q. Do you know what kind of a gun it was? Was it a pistol?

A. It was a pistol, yes.

Q. Then what happened after this man announced to you that this was a stickup? A. Well, at the same time the car pulled up beside me, had me between my car and his, and he said, "Get in this car, we mean business." The driver of the other car --

Q. You say another car pulled up? A. That's right.

Q. Then after the man said, "We mean business", what happened next? A. He struck me over the head with what appeared to me as a sawed off shotgun or a piece of pipe.

MR. JOHNSON: I am a little confused about the "he's", the pronouns. I didn't know whether he was referring to the man that came up or the man that was in the car or who.

THE COURT: What is your point? You say you --

MR. JOHNSON: I just couldn't understand him.

THE COURT: Let the reporter read the answer.

(The answer was read by the reporter.)

MR. JOHNSON: That was the driver of the car?

BY MR. FLANNERY:

Q. The driver of the car struck you? A. The driver of the car, yes.

10 Q. Now, how old are you, Mr. Good? A. 60 years old.

Q. Now, after you were struck over the head, then what happened?

A. Well, they shoved me in the front seat of the car between the driver and this other boy.

Q. Were you wearing your glasses at the time? A. I had my glasses on, but they was knocked off in the street.

Q. Your glasses were knocked off at that time? A. Down in the street before I got in the car.

Q. Did you get into the car? A. Yes, I got in the car.

Q. And in what part of the car did you get? A. I was in the front seat between the two men.

Q. Now, did you sustain an injury as a result of having been hit? A. Yes, I had a knot on the back of my head that was cut open, and I had blood all over my shirt.

Q. Blood all over your shirt? A. Yes.

Q. What happened after you got in the front seat of the car? A. They made me -- shoved my head down under below the windshield
11 so nobody could see me, and they drove around the block in an alley, and there they made me get out and tied my hands behind my back and blindfolded me and put me in the rear of the car and told me to lay down flat on the back seat.

Q. All right. Did you then get into the rear of this car? A. I did.

Q. Were you carrying anything at that time? A. I had my groceries that night with me.

Q. Your groceries? A. That's right.

Q. And what type of groceries? A. I had a jar of mayonnaise, a bag of sugar, that I remember.

Q. A bag of sugar? A. Yes. That was broken.

Q. After you got in the back seat of this car, what happened at that point? A. Well, they came back around in front of my house and picked up my car. They asked me where the keys to my car was.

Q. Asked you where the keys to your car was? A. That's right.

Q. What did you say? A. I said they are still in the door.
12 I suppose; I never got the car unlocked.

Q. And then when they drove back in the vicinity of your house and asked about your car, then what happened? A. Well, they drove me out towards Maryland, I imagine. I was blindfolded and couldn't see, but I was in the back of the car riding, and one of the boys got out and drove my car.

Q. One of these men got out of the car? A. Yes, and got my car.

Q. And the other man drove you somewhere? A. He drove me out towards Maryland.

Q. All right. Now, what happened next? A. Well, as soon as they parked my car, the other boy got in the car and the driver told him to search me, go through my wallet.

Q. Search you? A. Yes.

Q. And that was in the area where your car was parked? A. I imagine it was; I was blindfolded.

Q. So what happened then? A. Well, they didn't -- asked me if that was all the money a manager made.

Q. Did they take your money? A. They took the money.

Q. How much did they take? A. $85.

13 Q. Did they take your wallet? A. Yes, but they returned the wallet.

Q. And did they take anything else? A. Well, --

Q. Was there a key? A. They had the key to the store, yes.

Q. Now, then after they took your money and took the key, what happened from that point, was there any conversation? A. Well, they wanted to know what the combination of the safe was.

Q. The safe in your store? A. In the store.

Q. And what did you say? A. I told them I didn't have the combination, that I didn't know the combination.

Q. All right. Did you know the combination? A. I did.

Q. But you didn't tell them? A. I didn't reveal it.

Q. Then what happened? A. They told me that they didn't want my money, all they wanted was the money in the safe, and I told them that this was payday at the store and that we didn't have a lot of cash in the store, that it wouldn't be worth while going in there because there

14 was a lot of Government checks and payroll vouchers which wouldn't amount to anything, that they couldn't cash, and very little cash in the safe.

Q. So, did you have any other conversation? A. Well, they told me several times if I didn't reveal the combination they would go in the Safeway store and open the safe for themselves, that they would make it hard for me.

Q. They would make it hard for you? A. Yes.

Q. But despite that you did not tell them the combination of the safe? A. No, I didn't.

Q. Then what happened? A. Well, I was riding around, I don't know where I was at, and still in the back seat riding around, and they finally run out of gas or were about out of gas and said, "We have got to go in this filling station and get some gasoline."

Q. What happened then? A. They told me to lie still while they were getting the gasoline, and they put a cap over my face and covered my face and said, "If anybody sees him there, they will think he is a drunk laying back there", so that there wouldn't be any suspicion.

Q. Did you go to a gas station? A. They was in a gas station.

15 Q. Did they get gas? A. They got a dollar's worth of gas.

Q. In the meantime, was the bag of sugar, which was in your possession, in the back seat of the car with you? A. Yes, that's right.

Q. And did you do anything in regard to that? A. Well, I tramped it around in the floor.

Q. You tramped the sugar around in the floor? A. Yes.

Q. You did that? A. Yes, sir.

Q. Now, what happened next after you went to the gas station? A. Well, they came on back, and I don't know, I was blindfolded and don't know where I was at. They said, "Here is some woods, we might drop him off in the woods." One of them said to the other one, "Why? He seems like he is telling us the truth, like a good old man. We will take him and try to find his car." And they drove around about 10 minutes more, I imagine, before they found the car.

They asked me if there was any construction going on in the neighborhood of the store. I told them there was on Eastern Avenue below the store, and so therefore I didn't know any other construction. They said,

"We parked your car near a place where there is some construction going on."

16 Q. All right. Now then, keep your voice up real loud. What happened next? A. Well, they finally found my car, and they drove to Eastern Avenue and North Capitol, it was, and they let me out of the car.

Q. Let you out of their car? A. That's right.

Q. Now, when they let you out of their car, where was that? A. Eastern Avenue and North Capitol Street.

Q. In the District of Columbia? A. Right on the District side, yes.

Q. In the District? A. That's correct.

Q. Now, when they left you out of their car, did they say anything? A. They told me to go straight down Eastern Avenue, keep walking until they was out of sight. They took the blindfold off of me and told me not to look at either one of them.

Q. Not to look around? A. That's right.

Q. Then what did you do? A. As soon as they reversed the car up North Capitol, I immediately proceeded up North Capitol.

Q. You walked up? A. I walked up off of Eastern Avenue to North
17 Capitol where I found the car about a block off Eastern Avenue on North Capitol Street.

Q. You found your automobile? A. That's right.

Q. And you found your car about how far from where you had been left out of their car? A. About a block, I imagine.

Q. Now, where was your car found? Where did you find it? A. North Capitol, on North Capitol Street.

Q. On North Capitol Street? A. Yes.

Q. Do you know the name of the intersecting street? A. Well, no; I don't. It was near Eastern Avenue.

Q. In the District of Columbia? A. Right.

Q. Now, when you got to your car, what did you do then? A. Well, I started to go in a house there to call the police, and I thought, "Well, I can get home before I can get any police", so I went home. My wife

would be there anyway, and I didn't want the police to get to the house before I did, so I went home, straight home, and I called the police right away.

Q. When you went back to your car, did you find the keys in it?

18 A. The keys was in the car, right.

Q. Now, how far was your car when you found it from where you lived? Was it very far? A. Well, it was 6200 block, and I was in the 53 -- about nine or ten blocks.

Q. From where you live? A. That's right.

Q. When you got home, do you have any idea what time it was? A. It was about a quarter of twelve when I got home.

Q. Quarter of twelve? A. That's right.

Q. And you had been accosted by these people about quarter to ten? A. About quarter to ten.

Q. So you had been in their custody for around two hours? A. That's right.

Q. Now, when you got home what did you do, what was the first thing you did? A. The first thing I did was call the police.

Q. And did the police respond? A. They was there right away.

Q. Right away? A. Yes.

19 Q. Now, Mr. Good, are you able to identify either one of the two people who robbed you? A. I was not, no.

Q. You were not able to identify them? A. No, sir.

Q. Your glasses, I believe, had been knocked off? A. Yes.

Q. When this incident started? A. When it started; that's right.

Q. Did the police take your car down to police headquarters? A. Yes.

Q. After the robbery? A. He told me not to drive the car, and one of the policemen stayed there and watched it until they sent a tow truck after it.

Q. And took it to police headquarters? A. Yes.

Q. That was your car? A. That was my car.

Q. Now, then, directing your attention to several days later, August the 9th, do you have a recollection of an occasion when you went to police headquarters to see a certain 1951 Oldsmobile? A. I did.

20 Q. And who showed you that car? Do you remember that name, the name of the police officer? A. Detective Sergeant Young, I believe it was.

Q. And were you asked whether or not you could identify the automobile which you had been shown? A. Yes, I was.

Q. And could you identify that automobile? A. I picked the car out.

Q. How were you able to pick the car out? A. As soon as I saw the front seat, I said, "This is definitely the car that I was in."

Q. Was there something unusual about the front seat of the car? A. The front seat, the upholstery, it was a two-door car, and the upholstery was worn out between the two seats, and I had my elbow down in the hole.

Q. And did you notice anything else about this 1951 Oldsmobile at police headquarters, with reference to the back seat? A. Well, I didn't notice anything in the back seat except -- well, I had my groceries back there, you know, and the sugar that I had spilled. I said to the detective, "I think we can find some sugar here." They had the car cleaned out very thoroughly.

21 Q. Did you ever see any sugar? A. I said, "Let's look underneath the carpet, the matting on the floor, the floor carpet."

THE COURT: You say you found sugar underneath the carpet?

THE WITNESS: We found sugar underneath the carpet.

BY MR. FLANNERY:

Q. Under the carpet of this 1951 Oldsmobile? A. Yes, sir.

Q. Did you require any hospitalization for your injury? A. Well, the police called my doctor right away. He came in that night.

Q. Did the doctor treat you? A. He treated my head and advised me to go down to Emergency for x-rays the next day.

Q. Did you get x-rays? A. I had x-rays the next day.

MR. FLANNERY: That is all.

CROSS EXAMINATION

BY MR. JOHNSON:

Q. Mr. Good, during the course of your recital, you made a statement that this man that came up to you on, I believe, Third Street, Northwest? A. That's right.

Q. He was a light-skinned man; is that correct, sir? A. I thought
22 he was, but --

Q. That was your impression? A. That is my impression.

Q. And that this man held a gun on you? A. Yes.

Q. And that subsequently this car came up? A. That's right.

Q. And you were told to get into the car? A. That's right.

Q. Now, to the best of your recollection, I know it might be a bit hazy in spots, but to the best of your recollection, sir, can you tell me who opened the door to this car that came up? A. The driver opened the door, the one driving.

Q. I see. And then you attempted to get in; is that correct? A. Well, I hesitated on getting in, and by that time he struck me over the head and said, "Get in."

Q. Well, then, did the driver get out of the car? A. No, he didn't get out of the car.

Q. Then you were attempting to get in when the driver struck you? A. The door was open, and I was shoved up there.

Q. Up to the door? A. That's right.

23 Q. Now, this driver, did you get a chance to look at him? A. I didn't get a chance to look at him. I didn't get a chance to look at him at all.

Q. I see. And in any event -- by the way, Mr. Good, when you were out front, prior to the time, and while this man was talking to you, you say your neighbors came out, spoke to you, and got in their car which was directly behind yours? A. Yes.

Q. Would you mind giving me your neighbor's name? A. Preston Burroughs.

Q. Now, you have intimated that when they got you into this car

that one sat on your right side because the driver was behind the driver's seat; is that correct? A. That's it.

Q. And now, was one of these men taller than the other? A. Yes, the driver was taller.

Q. The driver was taller? A. That's right.

Q. And now when you started down the street in the automobile, how far did you travel, about how long a period of time before they stopped? A. I would say it was three or four minutes.

Q. I see. Was that the time they came up to your automobile?

24 A. That was between the time that they taken me around the alley and tied me up, and then they came back and picked my car up.

Q. I see. Now, when they were around the -- your testimony then is: You were sitting in between these two men, and you went around into an alley, and did any one get out of the car in the alley? A. Yes.

Q. Who got out in the alley? A. The shorter man got out in the alley, got out of the car.

Q. I see. Now, then with regard -- did he get back in the car? A. He got back in the car, yes.

Q. Was that after they had put you in the back seat? A. After they put me on the back seat.

Q. Which one of the two men tied you up, the man that got out with you? A. I think it was; I'm not sure, but I think it was him, because the driver didn't get out of the seat.

Q. The driver didn't get out? A. No.

Q. Did this man that you saw that had the gun on you, tied you up and blindfolded you? A. That's right.

25 Q. And put you in the back seat, is that correct? A. Yes.

Q. Then he got in the car? A. Yes.

Q. Then you drove somewhere, is that right? A. That's right.

Q. And then during the period of this drive is when they asked you where the keys to your car were, is that correct? A. No, they drove around in front of my house.

Q. Around in front of your house again? A. From the alley.

Q. And asked you for your keys? A. Yes.

Q. And you told them they were in the key lock more than likely in the door? A. More than likely.

Q. Then one of them got out. Which one got out? A. It must have been the shorter one, because the driver--

Q. The shorter one got out? A. I don't think he--

Q. Then the shorter one went and got your car, I imagine; is that correct, sir? A. That's what I figured.

Q. Because the driver stayed in with you? A. That's it.

26 Q. And then you went, the driver went with you on this long foray; is that correct, sir? A. That's right.

Q. And what time was it that this second fellow, who was driving your car, at what period during this drive did he get back into your car, the car in which you were? A. I figured it was after he parked my car on North Capitol.

THE COURT: I will ask counsel to come to the bench.

(Conference at the bench:)

THE COURT: Mr. Johnson, of course, you have a perfect right to proceed along the line that you are proceeding, and I am not going to preclude you, but may I offer this suggestion: This witness is only here to testify to the fact that there was a robbery. No testimony was elicited from him which would connect your client with the robbery, so what do you propose to accomplish by the cross examination, so far as your client is concerned?

MR. JOHNSON: I will tell you, if your Honor, please. This testimony is going to acquit my client, because the proof is that he couldn't have been in the other car.

THE COURT: What did you say?

MR. JOHNSON: He could not have been in the man's car.

27 THE COURT: All right.

(Conference at the bench concluded.)

BY MR. JOHNSON:

Q. And, Mr. Good, when this man got back in the car from your car, I imagine-- A. That's correct.

Q. --then you drove to the gas station; is that correct? After driving around a little? A. After driving around a little, yes.

Q. And there came a time when they were getting short of gas, or something; is that correct, sir? A. Yes.

Q. Did they actually run out? A. No, they didn't run out. They said the gas was low.

Q. Then they drove to a gasoline station; is that correct? A. Yes.

Q. And did they both remain in the car? A. I think they did; I don't remember them getting out.

Q. You would have heard the door open and shut, wouldn't you? A. Yes.

Q. They got the gas, and then the conversation about you being cooperative, and they were going to try to find your car; is that it?

28 A. Yes.

Q. And they drove you back to a place where you got out? A. Yes.

Q. Now, at the place where you got out, that wasn't near your car; it was a block away; is that correct? A. Yes.

Q. And when you got out, can you tell the ladies and gentlemen of the Jury how you got out? A. Well, I got out on the front seat -- you see, the seat is broken, a two-door, I stepped over that, and after I got out on the sidewalk they took the blindfold off and told me to look straight ahead.

Q. Now, just a second. I don't want to confuse you, sir, and I want to thank you for being so cooperative, but there is one thing I think you slided over a little bit.

You said they took the blindfold off. Now, one of these men took the blindfold off, didn't he, sir? A. Yes.

Q. Now, was it the driver or the other man that took the blindfold off? A. I am not sure. I think it was the other man. I don't think it was the driver.

THE COURT: I think we will suspend at this time for the day.

29 Ladies and gentlemen of the Jury, you may be excused at this time until tomorrow morning at 10 o'clock.

Please remember the admonition I gave you before we started the trial, not to discuss this case overnight. You will be excused at this time, and please be back in your seats in the Jury box a few minutes before 10 o'clock tomorrow morning.

(Whereupon, at 3:40 o'clock p. m., a recess was taken until 10:00 o'clock the following morning, February 12th, 1958.)

30 PROCEEDINGS

THE DEPUTY CLERK: United States versus Clayborne Bynum.

THE COURT: Bring in the jury.

THE DEPUTY CLERK: All witnesses in the case of The United States versus Clayborne Bynum, please come up and follow the marshal to the witness room.

THE MARSHAL: All witnesses, both sides.

THE COURT: Did you finish your cross-examination of the witness on the stand?

MR. JOHNSON: No, sir, I did not.

THE COURT: I hope you can do so with reasonable dispatch because, after all, his evidence has not connected your client with the offense. When it comes to the evidence connecting the defendant with the offense, of course, I shall give you full leeway for cross-examination but it seems to me that lengthy cross-examination is of no particular moment so far as the defendant is concerned because he is unable to identify the defendant.

MR. JOHNSON: My area of examination, may it please the Court, was limited to that part of his testimony in which he described the complexion of the man that got into his car.

THE COURT: Of course, you are entitled to that, it may be important.

31 Whereupon

EDWARD N. GOOD

resumed the witness stand and, having been previously duly sworn, was examined and testified further as follows:

CROSS-EXAMINATION

BY MR. JOHNSON:

Q. Mr. Good, at the time you first talked to the police officers in this case did you give them a written statement? A. Well they taken a statement; I didn't write it; they wrote it.

Q. Did you sign it, sir? A. I don't remember whether I did or not.

Q. Mr. Good, is there any way in the world you can identify the gasoline station you were in? A. No, I couldn't, I couldn't see so, therefore, I could not identify it. I checked at the station right below the store and they didn't remember anything about it. That is all I checked.

Q. Were they open at that time? A. They were open at that time.

Q. That is the only station in that area? A. There are a couple of them down that way, Sunoco and Shell, and I think Shell closed at ten and Sunoco closed at eleven.

Q. Are they in Maryland or the District of Columbia? A. In Maryland.

32 Q. All in Maryland? A. Both in Maryland.

MR. JOHNSON: That is all.

REDIRECT-EXAMINATION

BY MR. FLANNERY:

Q. I have one question. Yesterday you said you were under the impression that the man who got out of the car might have a light skin. Now are you sure whether the man who got out of the car originally was light skinned or not? A. No, I am not sure at all.

Q. You are not sure? A. No, sir.

RECROSS-EXAMINATION

BY MR. JOHNSON:

Q. But that is your best recollection, the man who came up the street is the first one you saw? And your first recollection is that he was a light skinned man? A. No, I can't say. The way the light shined on him I can't remember whether he was dark or light.

Q. What caused you yesterday to tell us he was a light skinned man? A. I got the one confused with the one who was driving.

Q. As I recall the one who was driving was tall? A. Yes.

Q. And the one outside that came up to you was a shorter light skinned man? Isn't that what you told the Court and jury yesterday?

33 A. I don't remember whether it was light; I don't recall.

Q. You don't remember whether it was light, whether the man was light? A. No.

Q. Why? A. I couldn't identify the color because it was dark that night and it is very dark along my part of the street, right there where I live.

Q. Was it under a light where you were? A. No, the light was across the street and there was a tree right over the car.

Q. What gave you the impression yesterday when you were talking to cause you to tell this jury and Your Honor that the man that came up to you --

THE COURT: You may ask him whether he said so and so but you may not state to him that he said so and so. Suppose you rephrase your question.

Q. You did say yesterday that he was a light skinned man? A. I wasn't sure.

Q. Now whether you were sure or not you said yesterday to this jury and in this court room that the man that came up to you was a light skinned man? A. He came up on the sidewalk and I was on the other

34 side of the car.

Q. Mr. Good, just a second. I don't want to interrupt you but the particular question is "Whether you did not yesterday tell in this court room while on the stand that the man who came up to you was a light skinned man?" Did you testify to that or not? A. I don't recall that if I did.

Q. You don't recall whether you did or not? Is that correct, sir? A. Yes, sir.

Q. Did you tell the police originally when you were first interviewed that the man that came up to you was a light skinned man? A. I don't recall.

Q. Didn't you give them a description of the man who came up to you? A. No, I just told them one was tall and one was short.

Q. You did not describe their color? A. No, I couldn't see.

THE COURT: Will counsel come to the bench?

(At the bench:)

THE COURT: Mr. Johnson, you always want to get at the truth and in the most effective way without using the remote approach.

35 MR. JOHNSON: Yes, sir.

THE COURT: If the defense counsel is interested in actually knowing what description was given by the victim, I am sure that Mr. Flannery would make that description available to you.

MR. JOHNSON: Will he make available to me then the police progress report, that is, the interview with this man?

THE COURT: No, you know that is not what I said.

MR. JOHNSON: I know that isn't what you said.

THE COURT: Now you know in the Jencks case, as modified by statute, it was ruled you are not entitled to that according to the statute.

MR. JOHNSON: I think, if Your Honor please, here the issue is as to what this gentleman said and he doesn't know and it has become of prime importance--

THE COURT: I told you that personally I do not think it is important but I said you were entitled to see the description he gave, but that does not mean you are entitled to see all the progress reports.

MR. JOHNSON: Just the description?

THE COURT: The description given originally. You are entitled to see that and I know Mr. Flannery will make that available to you without any directive from the Court.

(Following bench conference:)

BY MR. JOHNSON:

Q. Now Mr. Good, did you talk to any one yesterday afternoon

36 after you left this court room? A. No, I didn't.

THE COURT: No, just a moment. I do not think you can go into that on recross-examination. This is recross-examination and it must be limited to re-direct.

BY MR. JOHNSON:

Q. Did you talk to any one about the complexion of the man that you described after you left the court house until this morning? A. No, sir, I haven't talked to any body.

THE COURT: I ruled that you could not ask that.

* * * * *

40 JENNY MANNIX

* * * * *

DIRECT EXAMINATION

BY MR. FLANNERY:

Q. Now what is your full name and address? A. Mrs. Jenny Mannix.

THE COURT: Oh, no, you will have to speak louder, more slowly and distinctly, so the reporter and the jury may understand what you say. You are in a big court room with a high ceiling and you will have to make an effort to be heard.

THE WITNESS: Mrs. Jenny Mannix.

Q. That is spelled M-a-n-n-i-x? A. Yes, sir.

Q. On August 6, 1957, were you employed at a Safeway store? A. Yes.

Q. Where was this Safeway store? A. The Safeway store is located at New Hampshire Avenue and Eastern Avenue. I believe the correct address is 6300 New Hampshire Avenue.

Q. 6300 New Hampshire Avenue? A. Yes.

Q. In what capacity were you so employed? A. I check at the register people taking groceries out-I check the bag of groceries and I

41 am right in front of the window sill at the door.

THE COURT: Speak louder and speak more slowly and then you can be understood more easily.

Q. You check the customers as they go out and collect the money? A. That is right.

Q. Now then what time did you get off work on the evening of August 6, 1957? A. That evening we were unusually late due to a

customer who was at the store much later than our normal evenings. To the best of my knowledge it was about nine forty when I left the store.

Q. Approximately nine forty in the evening when you left the store? A. That is right.

Q. When you left the store was another employee left in the store behind you? A. Yes. At the time I got ready to leave Mr. Good and I were the only two at the store. We were putting the money from the register into the safe. The Safeway requires that two people be there at that time.

Q. Did you leave before Mr. Good after you finished your last minute duties? A. Yes. I was tired and I asked Mr. Good if he minded if I left right then rather than to wait.

42 Q. When you left the store did you see anything when you came outside? A. Just as I stepped outside the door and Mr. Good snapped the lock behind me a man was approaching the store which was very unusual at that hour.

Q. All right then, what else did you see? A. Well the man was coming straight to the door and his general appearance unnerved me. The Safeway store is located in a very empty section. There is nothing across the street, nothing on either side of us where people would be coming for anything at that hour. So at that point I became a little nervous when I saw this man and I hurried to my car.

Q. What did the man look like? A. He was quite tall, he was a colored man, and to the best of my recollection he had on a white T-shirt but I can't be positive about his trousers or hat.

Q. All right, what happened next? A. He approached the door just as I came out but he must have been about twelve to fourteen feet from me when the door was closed behind me.

Q. Where did you go then? A. I went straight to my car which was at the curb and I still kept looking at the man because I thought it was strange he should be there. He stared in through the door and followed Mr. Good around in the store. I sat there for a very short time and ob-

43 served what he did after he walked from one end of the show case

to the other, peering inside. He finally turned around and started across the street on the other side of New Hampshire Avenue and there is nothing there except an enormous vacant lot. I looked to see whether the man went farther down and directly across from the store, I could see a good half block down, there was a car sitting across the street. I am almost sure there is a no parking sign across the street and most of the time there are no cars over there. That made me suspicious of seeing a vehicle standing there and as the man went to that car I had my motor started in the car and I pulled away and I started to drive home and I began to wonder whether that man was just up to some sort of mischief or trouble so I drove across under the light and possibly a block or block and half and then I made a U turn and came back and after I came back and pulled up in front of the store, I noticed that the car that had been sitting across the street had pulled around and was sitting directly in front of one of the doors at the store. I sat parked in my car in back of this black car and waited for Mr. Good to come out.

Q. At that point did you notice how many, if any, occupants were in the black car? A. At that time there were two people in the car; they were of different height, one seemed to be tall and one seemed to be shorter. Whether he was slumped in the seat or not I couldn't say.

44 Q. Then what did you next see? A. I sat there waiting for Mr. Good because I thought I would at least see that he came out of the store and got to his car. The two men sitting in the car in front of me turned around and looked at me a couple of times and that made me nervous so I finally pulled away from the curb and circled to the corner and I went to the top of the hill and turned my car around and came back and as I came back and started to pull on to the parking lot Mr. Good was coming out of the store and he walked from the store to his parking lot and after he got in his car, I pulled to the front of the lot and as Mr. Good came in his car to the front of the lot, I pulled up and spoke to him.

Q. You did say something to him? A. Yes, sir.

Q. After you said something to him what else did you see? A. At the time I was talking to Mr. Good the car was still parked in front of the

store on New Hampshire Avenue, and at this time that I was talking to Mr. Good the car pulled around and hemmed me in between Mr. Good and their car.

Q. Could you see the occupants of the car? A. I could see there were two people in the car but I talked to Mr. Good so I turned my head from them.

Q. Can you identify either of the two people? A. Not positively. I can only state they were two colored men but as far as positive facial
45 identification it would be difficult.

Q. What else did you do? A. After I talked to Mr. Good he made a turn and he pulled off the lot-he was facing the street and I wasn't- so I had to make a turn and as I made my turn I noticed the car had gone to the back of the lot and they had also made a turn there facing New Hampshire Avenue. We both pulled off the lot and I went straight and Mr. Good came to the corner and turned and that was the last I saw of him and the other car.

Q. Did you notice anything about that car other than the two men? A. Well I noticed it was a black car, I couldn't tell the model because I wasn't positive, I was really too nervous at the time to worry about the model. I didn't know what the car was doing there anyway. I noticed the license tags on the car while I was parked behind them in front of the store.

Q. Did you make a mental note of the license tag? A. Yes, I did at that time.

Q. What was the license number? A. The license was Maryland license and the number that I remember was JK 81 50.

THE COURT: Would you mind repeating that?

THE WITNESS: JK 81 50.

THE COURT: JK 81 50?

MR. FLANNERY: That is right.

46 BY MR. FLANNERY:

Q. And a Maryland tag? A. Yes, sir, it was Maryland tags.

Q. Now then, did you go home then? A. Yes, I went on home.

Q. Now then subsequently did you give that license tag Maryland JK 81 50 to the police? A. The next day I did when the police wanted it.

* * * * *

CROSS-EXAMINATION

BY MR. JOHNSON:

Q. With regard to the time that you fixed at nine forty, how far do you live from the store? A. Well I live several miles from the store, I don't know the exact mileage.

Q. Do you know generally how long it takes you to get home from the store? A. It takes me fifteen minutes or so, driving not too fast, or twenty.

Q. About what time was it when you got home? A. It was just about ten, which was very, very late.

Q. Very late? A. That is right.

47 Q. Now then the man that you said came up to the store front, the front of the store, you watched him as he went to get in the car, did you not? A. Yes.

Q. What part of the car did he get in? A. That I can't say.

Q. Now the car was parked against the curb, was it not? A. Yes.

Q. Was it parked so the left side of the car was facing you? A. Yes.

Q. Now did he go around the car to get in or did he get in directly? A. I don't know because he was a good half block or more beyond me.

Q. You don't know which door he got in? A. No, I didn't.

Q. When the car came up to where you were and you were parked in back or it was parked in front of you, was-- A. When I came back they were parked in front of the store.

Q. Was the man you saw in front of the Safeway, was he the man driving the car? A. That is the way it appeared to me, he was at the wheel.

48 Q. And he was a tall man? A. Yes.

Q. Did you ever see the other man get out of the car? A. No.

Q. Well now, how could you tell whether he was a short man or not? A. Well as I was sitting in back of them my car lights were on

them and my motor was running. They were not too far in front of me and I could see the two figures in the car and the head of one was quite a bit lower than the other. That is the only way I could judge the difference in height.

Q. Is it your experience that you are of the opinion that you can tell a man's height by the position of his head, yet he is sitting down? A. Well, no, I couldn't tell whether he was slumped or sitting up straight and that would make a difference.

* * * * *

49 VINCENT L. ANTONELLI

was called as a witness by the Government and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. FLANNERY:

Q. What is your name, please for the record? A. Vincent L. Antonelli.

MR. FLANNERY: Officer you are going to have to speak a little louder.

Q. You are a police officer, aren't you? A. Yes, sir.

50 Q. A member of the Metropolitan Police Force attached to the Robbery Squad? A. Yes, sir.

Q. And your rank is what? A. Precinct detective.

Q. Now then were you employed in such capacity on August 6 and during the early morning hours of August 7, 1957? A. Yes, sir.

Q. On that date, namely August 6, did you have an occasion to respond to the home of Mr. Edward N. Good? A. Yes, sir.

Q. What time did you respond to his home? A. It was about 11:15 or 11:20.

* * * * *

Q. About 11:15 or 11:20? A. P.M.

Q. And his home was where, sir? A. I think the address is 5311 Third Street, N. W.

Q. Northwest? A. Yes.

Q. Did you see Mr. Good when you arrived at his home? A. Yes, sir.

Q. Did you notice anything unusual about his physical condition at that time? A. He had a laceration on top of his head.

51 Q. Did he make a certain report to you in regard to an alleged robbery? A. Yes, sir.

Q. Did he give you a description of the robbers? A. He described one man.

THE COURT: Let him answer yes or no first.

THE WITNESS: Yes.

MR. FLANNERY: Do you want --

MR. JOHNSON: I think he must have made a report of it somewhere.

MR. FLANNERY: At this point, Your Honor, I might make available to the defense counsel the information that he wanted. May we pause for just a moment?

THE COURT: Let the record show what you are going to do, Mr. Flannery.

MR. FLANNERY: May the record show, Your Honor, that I am going to ask the officer at this time for the description the complaining witness gave to him of his attempted robbers.

THE COURT: You may tender it to the defense counsel.

(Mr. Flannery passed to Mr. Johnson the document being discussed.)

MR. JOHNSON: Your Honor, please, I can't tell what number 1 or number 2 is unless I turn it over and read the rest of it.

THE COURT: You have the right to ask him that on cross-examination if you choose to do so.

52 MR. JOHNSON: I have to turn this report over, he has folded it.

THE COURT: You have the right to ask that on cross-examination.

MR. FLANNERY: I may have. I just wanted him to have a description, he is not entitled to the rest of this report.

THE COURT: In fact, technically speaking, he is not entitled even to the description, but I think in the interest of justice, he may be allowed to see it.

BY MR. FLANNERY:

Q. Now then Detective Antonelli, did you make arrangements to have the complaining witness, Mr. Good's, car towed to Headquarters that evening? A. Yes, sir, later on that night.

Q. Later on. Based on information you received did you have certain teletypes sent out through police channels? A. Yes, sir.

MR. JOHNSON: May I have the teletype message?

THE COURT: Now Mr. Johnson, you should not make a statement of that kind in open court. You know that.

MR. JOHNSON: May we approach the bench?

THE COURT: Yes, indeed.

(At the bench:)

THE COURT: I do not suppose there is any harm in giving it to you but it is obviously irrelevant and inadmissible.

You may proceed.

53 MR. JOHNSON: He has already had him testify about it.

THE COURT: You must not interrupt the examination of a witness on irrelevant matters. At an appropriate time, if you have any requests to make, you may come to the bench.

You may proceed. Is there any cross-examination?

(Following bench conference:)

MR. FLANNERY: That is all I have of this witness.

MR. JOHNSON: If your Honor please, he says that is all he has of this witness at this time. If this witness has any other information I think we should hear it now.

THE COURT: If you have any requests to make you must come to the bench. I do not permit counsel to make extraneous statements in open court.

(At the bench:)

THE COURT: I want to remind you, Mr. Johnson, that if Government counsel were to make references that might be prejudicial to the defense that might be a ground for a mistrial. Obviously in criminal cases the Government may not move for a mistrial because the defense

counsel makes improper statements, but the rule of orderly procedure as practiced in this Court, precludes defense counsel from making extraneous statements in open court. If you have any requests to make, the Court will request you to come to the bench instead of having you make an extraneous statement in open court.

MR. JOHNSON: I would like to move that the evidence that he
54 sent messages to other police be stricken. It is immaterial and I move that it be stricken. I would like also to ask that this witness, finally, I don't think his testimony should be chopped in two.

THE COURT: He has a right to do that. I do not know what testimony you want to strike?

MR. JOHNSON: I am moving to strike out the testimony he elicited from the witness that he had sent out some teletype message concerning the report that a robbery -

THE COURT: I think the fact he sent out a teletype message is perfectly innocuous because the contents of the message are not here. That is perfectly innocuous and I am going to deny the motion.

MR. JOHNSON: Is Your Honor going to permit him to identify this defendant? He has suggested --

THE COURT: He has a perfect right to do that.

MR. JOHNSON: May I reserve my examination until he testifies in chief?

THE COURT: With this qualification the Government is under no obligation to call the witness back.

MR. JOHNSON: I am limited on cross-examination to the content of his direct.

THE COURT: That is to all he has testified. You may reserve your cross-examination until if and when the witness is recalled.

MR. FLANNERY: I do not plan to recall the witness. I think he
55 should cross-examine him now.

THE COURT: Are you going to recall the witness?

MR. FLANNERY: I do not plan to recall the witness. I do not know where he got the idea.

THE COURT: Why did he think you were going to recall the witness? I do not finally excuse any witness until the counsel calling that witness makes the request, not opposing counsel.

MR. JOHNSON: May I request this be regarded as a hostile witness and as an adverse witness to me?

THE COURT: You may cross-examine and may not call him as your own witness later in your case.

MR. JOHNSON: I agree with Your Honor. He is on the stand, he had something to do with this case, he is in charge of the Robbery Squad. I would like to examine him about the investigation of this case.

THE COURT: In other words, you want to call him as your witness?

MR. JOHNSON: I want to call him as a witness for the defendant. I cannot vouch for him.

THE COURT: Mr. Johnson, you know the old idea of vouching for a witness that you call is really obsolete; at least obsolescent, and I never consider a person vouches for a witness. That used to be an old idea and there is history back of it, because in the middle ages witnesses were known as compurgators; they were a part of the group that
56 a party called to swear he was an innocent man.

MR. JOHNSON: Yes, sir.

THE COURT: I think that idea is a relic of the past so I would not consider, if you called him as your own witness, you were vouching for him. You can examine him as a hostile witness and this would necessarily depend on the manner --

MR. JOHNSON: I couldn't suggest that he would be hostile, to tell you the truth, I think he would be an adverse witness.

THE COURT: In any event, I think in a criminal case, it is best to follow the orderly procedure.

(Following bench conference:)

THE COURT: Any cross-examination?

MR. JOHNSON: No, sir.

* * * * *

57 WALTER E. CHESLEY

* * * * *

DIRECT EXAMINATION

BY MR. FLANNERY:

Q. Please state your name? A. My name is Walter E. Chesley.

Q. Spell the last name? A. C-h-e-s-l-e-y.

Q. Where are you employed, Mr. Chesley? A. By the Metropolitan Police Department.

Q. And what is your job with the Metropolitan Police Department. A. Crane operator.

Q. All right, a crane operator?

THE COURT: What is his job?

MR. FLANNERY: Crane operator.

Q. Your job is to tow cars in. Is that right? A. That is right.

Q. On August 7, 1957, during the early morning hours of that day, did you receive an assignment to go somewhere and tow a car in? A. Yes, sir, I did.

58 Q. Where did you go? A. I went to 5311 3d Street, N. W.

Q. Washington, D. C. ? A. Yes, sir.

Q. What kind of a car was that? A. It was a Mercury sedan.

Q. What kind of tags were on it? A. DC NK 732.

Q. Do you know whether that car was owned by Mr. Good?

MR. JOHNSON: I object to that.

THE COURT: Technically, of course, your objection is sound. We can spend an awful lot of time having somebody come down who is the custodian of license numbers. Now if you insist, we will do that.

MR. JOHNSON: I will concede that it was correct. I just don't want his testimony about it.

THE COURT: If you concede this was Mr. Good's car, I will let him testify.

BY MR. FLANNERY:

Q. What did you do next? A. I craned it from there to Headquarters, Headquarters in the basement, and put it on the finger print block.

Q. You towed it from there to Headquarters and put it in the basement? A. Yes, sir.

59 * * * * *

JOHN P. LOGAN

60 was called as a witness by the Government and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. FLANNERY:

Q. Please state your name? A. John P. Logan.

Q. Where are you employed? A. Assigned to the Metropolitan Police Department, 14th Precinct.

Q. Were you so assigned on August 9, 1957? A. Yes, sir, I was.

Q. Now then on that day what shift were you working? A. From eight A. M. until 4 P. M.

Q. Now, did you go to roll call that day? A. Yes, sir.

Q. At that roll call did you receive certain information? A. Yes, sir.

Q. Relative to a certain automobile? A. Yes, sir.

Q. Then later on during your tour of duty, did you see an automobile? A. Yes, sir, I did.

Q. Where did you see that automobile? A. I saw the automobile at 50th Street and Grant Street, N. W.

61 Q. At what time? A. At approximately 3:00 P. M. in the afternoon.

Q. Is that in the District of Columbia? A. Yes, sir.

Q. Will you describe the car you saw? A. It was a 1950 Oldsmobile sedan, two-door sedan, black in color, bearing Maryland tags JK 8150.

Q. What did you do when you saw that car? A. I immediately pursued the car down Grant Street and stopped it at 48th and Grant.

Q. Who was the driver of the car? A. The driver of the car at that time was Kenneth Bynum.

Q. Not this defendant? A. No, sir.

Q. But this defendant's brother? A. Yes, sir.

Q. Then did you take the car and the driver of the car somewhere? A. Yes, sir, I did.

Q. Where did you go? A. To 14th Precinct.

Q. All right, and that is all you had to do with this case, is that right? A. Yes, sir.

62 THE COURT: Any cross-examination?

MR. JOHNSON: Yes, sir.

CROSS-EXAMINATION

BY MR. JOHNSON:

Q. Mr. Logan, was that car, the driver of that car and the apprehension charged to you? A. It was not.

Q. Who was it charged to? A. At the time he was Kenneth Bynum who was arrested, he was booked to Officer Noone of number 1 Precinct.

Q. Officer Noone? A. That is correct.

Q. Now can you spell his name, sir? A. N-o-o-n-e.

Q. He was your partner? A. No, sir, he was not.

Q. Who was present when you apprehended this car? A. I don't recall the name of the man at that time. I could get the information through the records of the department.

Q. I see. Now did you charge Kenneth Bynum with any offense?

THE COURT: I think that is immaterial, I am going to exclude that.

Q. You did arrest him, however, you said --? A. I brought the car and Kenneth to the Precinct for investigation of that look out.

63 MR. JOHNSON: That is all.

* * * * *

HARRY A. NOONE

was called as a witness by the Government and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. FLANNERY:

Q. Please state your name and assignment? A. Detective Harry A. Noone, 14th Precinct.

Q. N o o n e? A. Yes, sir, that is correct.

Q. You are a member of the Metropolitan Police Department attached to what precinct? A. Fourteenth precinct.

Q. Were you so employed on August 9, 1957? A. Yes, sir, I was.

Q. On that date did you have occasion to arrest the defendant in this case, Clayborne Bynum? A. Yes, sir, I did.

Q. What time was that? A. That was approximately 4:30 P.M. on August 9, 4:30 in the afternoon.

64 Q. Now, prior to seeing the defendant, Clayborne Bynum, did you see a certain automobile and the brother of Clayborne Bynum? A. Yes, sir, I did.

Q. How was it that you first contacted this defendant, Clayborne Bynum? A. He called the station on the telephone.

Q. This defendant called the station? A. At least he identified himself as Clayborne Bynum when he called the station.

Q. As a result of the conversation you had with him did you not tell him to do something? A. I told him to come to the station if he wanted to find out what his brother was arrested for.

Q. Did he come to the station pursuant to your invitation? A. Yes, sir, he did.

Q. And when he did you arrested him? A. Yes, sir.

Q. You turned him over to the Robbery Squad Detective? A. Yes, sir, I sent him to the Robbery Squad.

* * * * *

CROSS-EXAMINATION

BY MR. JOHNSON:

Q. You didn't arrest Kenneth did you? A. No, sir, I did not.

65 THE COURT: We will leave Kenneth out, he is not on trial.

MR. JOHNSON: Sir.

THE COURT: We will leave Kenneth out, he is not on trial.

BY MR. JOHNSON:

Q. Now, during the time when Kenneth was at the Precinct you permitted Kenneth to call his brother Clayborne, didn't you? A. No, sir,

I didn't.

Q. Didn't he call him? A. I do not know.

Q. Were you in the Precinct all during that period of time, from the time Kenneth got there until Clayborne got there? A. Yes, sir, from the time I got in the station around four o'clock and I was advised of the circumstances by Officer Logan.

Q. In other words, what time did you arrive at the Precinct? A. About four P. M. I was working from four till 12 that day.

Q. When you got there did you talk with Kenneth? A. No, sir, I didn't talk with him.

Q. Have you related all you had to do with this case to the jury? A. Sir.

66 Q. Have you related all you have got to do with this case to the jury? A. Yes, sir, I have.

Q. You don't know whether Kenneth called his brother and told him why you were making inquiries about him? A. What happened before I got to the station I can't say. When I got to the station Officer Logan advised me he had Kenneth under arrest with his car listed to Clayborne.

Q. Since you have related that part of the conversation, did he also tell you Kenneth had called Clayborne? A. No, he didn't.

Q. And he had given you permission to call and tell Clayborne--

THE COURT: You are not testifying.

MR. JOHNSON: I am not endeavoring to.

THE COURT: I know you are not endeavoring to.

BY MR. JOHNSON:

Q. In that conversation didn't Officer Logan tell you that Kenneth had talked to his brother Clayborne? A. Not in my conversation with him, no sir.

Q. You didn't have any conversation with Kenneth at all then? A. After I talked with Officer Logan I did have some conversation.

Q. Didn't Kenneth tell you he had talked to Clayborne on the tele-

67 phone at the Precinct? A. No, sir, he did not.

Q. Now when you talked to Kenneth where was he? A. Behind the rail in the station at 14th Precinct.

Q. Did you have anything to do with Clayborne's automobile at all? A. No, I just looked at the automobile after I had read the teletype message.

Q. You looked at --? A. I didn't touch it, didn't get in it.

Q. You looked at it and saw a fringer print on the side?

THE COURT: Just a moment, I think that is outside the scope of the direct examination.

REDIRECT EXAMINATION

BY MR. FLANNERY:

Q. Did you ask Clayborne whether he was the owner of the 1950 Oldsmobile with the Maryland registration? A. Yes, sir, I did when he arrived at the station.

Q. What did he say? A. He said he was the owner of the automobile.

Q. He was the owner of the automobile ? A. Yes, sir.

MR. FLANNERY: Thank you.

RECROSS-EXAMINATION

68 BY MR. JOHNSON:

Q. Is that all you asked him? A. No, sir, that wasn't all I asked him.

Q. What else did you ask him? A. In reference to what?

Q. Just what else did you ask him?

MR. FLANNERY: I object to that question as being too broad.

THE COURT: Mr. Flannery, the witness in answering some of your questions brought out part of the conversation, so opposing counsel has the right to bring out the balance of it. I will allow him to answer. Suppose you repeat your question.

BY MR. JOHNSON:

Q. What else did you ask Clayborne? A. I asked Clayborne if he was the owner of the Oldsmobile?

Q. What did he say? A. He stated he was and I asked him if his

brother drives the car all the time, whether he drives it, or who drives, and he stated he drives it and that he had loaned it.

Q. Is that all you asked him? A. That is the extent of my conversation. I showed him the teletype conversation.

Q. Did you ask him about the robbery? A. No, I had no cause to ask him about the robbery. I asked him if that was his car and he stated it was.

69 Q. Did you ask him anything about Mr. Good or --? A. No, sir, I didn't because I had no knowledge of this myself.

Q. You didn't know why the car was wanted? A. I knew it was wanted.

Q. Did you know it was wanted in connection with this robbery? A. Yes, sir.

Q. Did you ask the man anything about the robbery? A. I didn't know anything to ask about it.

Q. On August 9th you didn't ask him anything about the robbery? A. No, sir.

THE COURT: I think he has answered the question you asked him at least twice.

Q. What is your position at the Precinct? A. I work as plain clothes detective and as general field detective.

Q. Is that the reason this prisoner was charged to you? A. No, sir, Officer Logan was working day work and I was working four till twelve and he asked me if I wouldn't handle the case for him and pick up Clayborne and send him to the Detective Bureau.

MR. FLANNERY: May this officer be excused?

THE COURT: The witness may be excused.

70 * * * * *

JOHN B. SINGLETON

was called as a witness by the Government and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. FLANNERY:

Q. What is your name? A. John B. Singleton.

Q. And you are a member of the Metropolitan Police Force attached to the Identification Bureau? A. I am.

Q. Were you so employed on August 9, 1957? A. I was.

Q. On that day what shift were you working? A. Four until twelve. Four PM until 12 midnight.

Q. On that day, August 9, 1957, did there come a time when you saw one Clayborne Bynum? A. Yes, sir.

Q. Where was that? A. At the Identification Bureau.

Q. At what time? A. It was six o'clock. I was about six P.M.

Q. And at about 6 P.M. and you saw Clayborne Bynum and did there come a time when you took his finger prints? A. Yes, sir.

71 Q. And do you have those finger prints which you took from Clayborne Bynum at that time with you today? A. Yes.

Q. May I have them, please? A. Yes.

MR. FLANNERY: May I have this marked for identification, your Honor?

THE COURT: It may be so marked.

MR. FLANNERY: What are you marking those?

DEPUTY CLERK: Government Exhibit 1 for Identification.

(Document marked Government Exhibit 1 for identification.)

MR. FLANNERY: Your Honor, Government Exhibit 1 for Identification.

THE COURT: Government Exhibit 1 for Identification?

DEPUTY CLERK: Yes, Your Honor.

BY MR. FLANNERY:

Q. Officer Singleton, I will show you what has been marked Government Exhibit 1 for Identification. Are those the finger prints you took from Clayborne Bynum on August 9, 1957? A. They are.

Q. How can you identify them? A. I identify them by my stamp and initials.

Q. By your stamp and by your initials? Very well. A. Yes.

MR. FLANNERY: Your Honor, I would like to offer this into evidence.

72 THE COURT: They may be admitted.

(Government Exhibit 1 received.)

MR. JOHNSON: May I see them?

THE COURT: I think we have to proceed, Mr. Johnson.

MR. FLANNERY: May I proceed? May he examine this and in the meantime if he has anything else--

THE COURT: Can you examine them later on, perhaps at the noon recess? All he has done is to identify the document and it has been offered into evidence.

MR. JOHNSON: There is a notation at the top of it that I wanted to find out.

THE COURT: You can cross-examine the witness about it. I think you have sufficient time to inspect it. That is what I mean, we have to --

MR. JOHNSON: May I cross-examine before you admit it?

THE COURT: Just a moment. No, I have admitted Government Exhibit 1 for Identification into evidence. You may proceed.

BY MR. FLANNERY:

Q. Government Exhibit 1 was taken from Clayborne Bynum who is sitting at the counsel table? A. Yes, sir.

MR. FLANNERY: That is all.

THE COURT: You may cross-examine now.

CROSS-EXAMINATION

BY MR. JOHNSON:

Q. Did you type up this card? A. Let me see that a moment, please? No, that isn't my typing.

73 THE COURT: What was your answer, officer?

WITNESS: No, that is not my typing.

BY MR. JOHNSON:

Q. Who put those marks on there, do you know? A. Which marks do you mean?

Q. Did you do anything except take the finger prints? A. That is all I did.

MR. JOHNSON: If Your Honor please, I move that it be withdrawn from evidence until the remaining items on there have been identified and who put them on there.

THE COURT: My understanding is that all that has been offered into evidence was the finger prints, not the entire card.

MR. FLANNERY: Just the finger prints.

THE COURT: Suppose you give me the exhibit, let me see the exhibit. You may proceed.

BY MR. JOHNSON:

Q. Can you tell me what time you did that? A. Yes, it was six ten, that was the time marked the description was taken and the prints were taken. It isn't on that card but that is so.

Q. You are sure? A. Yes, sir.

Q. Were there any other prints taken that day? A. Oh, yes. Do you mean any other peoples' finger prints?

74 Q. In this particular case? A. In that particular case?

Q. Yes.

THE COURT: No, I am going to exclude that, that has nothing to do with the issues in this case.

MR. JOHNSON: May I approach the bench to tell you what--

THE COURT: Yes.

(At the bench:)

MR. JOHNSON: His car was brought down to the Precinct that day for the purpose of getting some prints of someone else off of it.

THE COURT: Yes, but you were asking whether anybody else's finger prints were taken that day in connection with this case.

MR. JOHNSON: May I rephrase?

THE COURT: Yes.

MR. JOHNSON: I want to know whether any prints were taken in connection with Clayborne's car - he had loaned.

THE COURT: I do not think that is within the scope of the direct examination.

MR. JOHNSON: He is the finger print man and -

THE COURT: He took the Bynum finger prints and that is all he has testified to.

(Following bench conference:)

75 * * * * *

HERBERT C. YOUNG

* * * * *

DIRECT EXAMINATION

BY MR. FLANNERY:

Q. Please state your name? A. Detective Sergeant Herbert C. Young, attached to the Robbery Squad, Washington, D. C., Detective Bureau.

Q. And the Metropolitan Police Force? A. Metropolitan Police Force.

Q. Were you so employed on August 9, 1957? A. I was, sir.

* * * * *

76 Q. Seven o'clock in the evening until twelve midnight? A. Yes, sir.

Q. During the evening hours that day, did you see a certain 1950 automobile? A. I did, sir.

Q. Where did you see that car? A. In the basement of the police building at headquarters.

Q. Now can you describe the car by license tag? A. Yes, sir.

Q. What tags did it have? A. It was a 1950 Oldsmobile and the tag number was Maryland JK 8150.

Q. All right. Did you notice anything about that automobile as to its interior? A. I did, sir.

Q. What did you notice? A. The front seat was torn pretty badly.

* * * * *

THE WITNESS: The front seat was torn in places and on the back floor of the car there was some white substance of some kind on the floor.

BY MR. FLANNERY:

Q. What did you do with regard to the white substance in the back of the car on the floor? A. I scraped it up off the floor and put it in a

little box and later transmitted it to the FBI for analysis.

77 MR. FLANNERY: Your Honor, I would like to have this small box marked Government Exhibit 2, the box and its contents.

THE COURT: It may be so marked.

* * * * *

Q. What did you do with the box and its contents? A. On August 13, I delivered it to the FBI building for analysis.

* * * * *

78 ROY H. JEVONS

* * * * *

79 DIRECT EXAMINATION

BY MR. FLANNERY:

* * * * *

Q. You are employed by the Federal Bureau of Investigation? A. Yes, sir.

Q. In what capacity? A. I am a Special Agent assigned to the FBI Laboratory as a microscopist.

* * * * *

MR. JOHNSON: I will stipulate to his qualifications.

* * * * *

Q. On August 13, 1957 was certain evidence turned over to you by Sergeant Young of the Metropolitan Police Department? A. Yes, sir.

80 Q. Now, I will show you what has been marked Government Exhibit 2 for Identification. This small box, what is that, sir? A. That is a box which was turned over to me by Officer Young.

Q. Very well. And did you open the box and make an examination of what was contained therein? A. Yes, sir, I did.

* * * * *

Q. Now did you examine the contents of the box? A. I did.

Q. Did you reach an opinion as to what the contents of the box were? A. Yes, sir.

81 Q. In your opinion, what did the box contain? A. Sucrose, sugar, or common table sugar.

MR. FLANNERY: Common table sugar. That is all.

* * * * *

EDWARD JOSEPH DION

* * * * *

DIRECT EXAMINATION

BY MR. FLANNERY:

Q. What is your name? A. Edward Joseph Dion.

Q. Where are you employed, Mr. Dion? A. At the Metropolitan Police Department, Identification Bureau.

82 Q. How do you spell your name? A. D i o n.

Q. How long have you been employed by the Metropolitan Police Department? A. Approximately eight years.

Q. Eight years. And are you a police officer or a technician? A. No, sir. I am a civilian finger print technician.

Q. Does your position require you to take photographs also? A. Yes, sir, that duty too.

Q. Now, directing your attention to August 9, 1957, do you remember what tour of duty you were working that day? A. Day work.

Q. And on that day did you have an occasion to see a certain automobile? A. Yes, sir.

Q. And did you have an occasion to take pictures of it? A. Yes, sir, I did.

MR. FLANNERY: May I have this marked Government Exhibit Number 3 for Identification?

DEPUTY CLERK: Government Exhibit 3 for Identification.

(Pictures marked Government Exhibit 3 for Identification.)

BY MR. FLANNERY:

Q. Now I show you what has been marked Government Exhibit 3 for Identification. Can you identify that? A. Yes, sir, I can.

83 Q. What is that? A. It is a photograph of a seat of an automobile which I took -

THE COURT: Officer speak a little louder so everyone can hear you.

THE WITNESS: This is a photograph of a front seat of an automobile that I took on 13 August 1957.

Q. On August 13, 1957? A. Yes, sir.

MR. FLANNERY: May I have this marked Government Exhibit 4 for Identification.

DEPUTY CLERK: Government Exhibit 4 for Identification.

(Picture marked Government Exhibit 4 for Identification.)

Q. Now I will show you what has been marked Government Exhibit 4 for Identification. What is that? A. This is another photograph of the same seat of the same automobile taken on the same date.

MR. FLANNERY: May this be marked Government Exhibit 5 for Identification?

DEPUTY CLERK: Government Exhibit 5 for Identification.

(Picture marked Government Exhibit 5 for Identification.)

Q. Now I will show you what has been marked Government Exhibit 5 for Identification and ask you if you can identify that? A. This is
84 another photograph taken of the rear end of the same automobile in which the other photographs of the torn seat appear.

Q. All right now, what type automobile was that of which you took the pictures? A. An Oldsmobile, a black Oldsmobile.

Q. Do you recall what the license tag was? A. I don't recall but the photograph shows the license plate in the picture.

MR. FLANNERY: Very well. Your Honor, I would like to offer these exhibits for identification into evidence after I show them to counsel.

MR. JOHNSON: May I see them, please?

THE COURT: Very well.

MR. FLANNERY: Your Honor, I wish to offer these exhibits into evidence at this time.

THE COURT: They may be admitted.

(Government Exhibits 3, 4, and 5 for Identification were admitted into evidence as Government Exhibits 3, 4, 5.)

MR. FLANNERY: Would your Honor like to see them after he passes them over?

THE COURT: Pass them to the clerk first. You may pass them to the jury, if you wish.

MR. FLANNERY: Thank you, Your Honor. Shall I discontinue my questioning while the jury looks at them?

THE COURT: Oh, no, that is not necessary.

85 BY MR. FLANNERY:

Q. Now, Mr. Dion, you have stated that you are engaged in finger print work for the Police Department, is that correct? A. Basically, yes, sir.

Q. How long have you been engaged in finger print work? A. A total amount of years would be eleven years.

Q. Will you tell His Honor and the jury the experience and education you have had in that type of work? A. I originally worked for the FBI.

Q. How long? A. About three years.

Q. And was that in finger print work? A. Yes, sir, it was.

Q. All right. Then what other work did you do? A. I worked with the FBI three years and for the last eight years I worked for the Metropolitan Police Department.

Q. In the course of your work as a finger print man, how many finger prints have you examined for the purpose of comparison? A. As to a figure I couldn't tell you a figure but perhaps over the years hundreds of thousands.

Q. Hundreds of thousands? A. Yes, sir.

Q. What is your understanding of the meaning of finger prints as means of identification? A. My understanding would be that no two prints made by two different fingers or from two individuals would be

86 identical, or the same indenture.

Q. Is it possible for two finger prints taken from two different

fingers to be the same? A. No, sir.

MR. FLANNERY: Your Honor, I submit the witness in view of his experience is qualified.

THE COURT: Oh, yes, he is qualified.

BY MR. FLANNERY:

Q. Now will you tell his Honor and the jury how comparisons of finger prints are made? A. Subsequently, I assume you would have a suspect print in your possession.

Q. Yes. A. And you would check an ink print of an individual print against a suspect print with a pair of finger print glasses and you would check out certain characteristic lines in one finger and search for certain characteristic lines in the suspect's finger.

Q. How can you arrive at a conclusion that finger prints are the same? A. If these characteristics that are found in one individual print are lined up, are located in exactly the same area, the same type of characteristic and each characteristic is in relation to each other then that would be your basis for identification.

87 Q. Directing your attention to August 7, 1957, did you have an occasion to examine a certain automobile in the garage of police headquarters in connection with this case? A. Yes, sir, I did.

Q. Now will you describe the automobile? A. It was a 1955 Mercury sedan, had a light colored bottom and a black top.

Q. And what tag did the car have? A. A District Columbia tag NK 732.

THE COURT: Is that Mr. Good's car?

MR. FLANNERY: That is Mr. Good's car, Your Honor.

BY MR. FLANNERY:

Q. Now then, describe for His Honor and the jury, what you did with regard to that car? A. Well to process an automobile for finger prints you have a finger print kit which has a certain amount of powder, finger print powder in the kit and using these powders, I processed this automobile to obtain finger prints. And using my powder and kit and photograph paper, I was able to lift standard prints from that automobile.

Q. Did there come a time when you looked at the rear view mirror of this automobile? A. Yes, sir, I did.

Q. Tell us what you did in regard to this rear view mirror? A. Using a finger print powder I dusted this rear view mirror and lifted
88 several prints from the mirror.

Q. Now tell us a little bit more specifically how you dusted the mirror and how you lift a print? A. Finger print powder that we use can be made from copper and charcoal and the reason for using this color of powder the print itself is invisible, the latent print, and if the surface that the print would possibly be on is a dark color surface, you use a light powder to bring a contrast point between the surface and the print itself so I can see that print if it appears, and using tape, it is made by the Scotch people, very clear tape, no dirt, no bubbles, no foreign matter, and the tape is placed upon the print and when you lift the tape off, you will take that latent print off the surface along with the tape and place this print along with photographic paper, unexposed photographic paper, which would be white.

Q. In this case did you put powder in the rear mirror? A. Yes, sir.

Q. Did you put a piece of tape on that mirror? A. Yes, sir, I did.

Q. Did you lift a print? A. Yes, sir, I did.

Q. Do you have that print with you today? A. Yes, sir, I do.

MR. FLANNERY: May this print be marked Government Exhibit 6 for Identification.

DEPUTY CLERK: Government Exhibit 6 for Identification.

89 (Prints marked Government Exhibit 6 for Identification.)

THE COURT: What number was that?

THE CLERK: Six, Your Honor.

BY MR. FLANNERY:

Q. Now Mr. Dion I will show you this which has been marked Government Exhibit 6 for Identification. For the record will you identify and explain what that is? A. The finger print on the end of this card which has a number on it is the latent print which I lifted from the rear view mirror of the 55 Mercury.

Q. So we can be clear what part is that, this part here? A. Yes, sir.

Q. Now then after you had that print, you had lifted it what did you do with it next? A. I lifted the print and coming back into the Identification Bureau I placed it in a jacket and marked the identification as to the location of the print, where it came from, as to the automobile and what not.

Q. Did you do something later on in regard to that? A. Yes, sir, I photographed this finger print.

Q. After you photographed this finger print what did you do with it? A. I made an enlargement.

Q. Do you have the photograph of the finger print? A. Yes, sir.

90 MR. FLANNERY: May these be marked Government Exhibits 6a and 6b for Identification?

(Photographs of finger prints marked Government Exhibits 6a and 6b for Identification.)

DEPUTY CLERK: Government Exhibits 6a and 6b for Identification.

BY MR. FLANNERY:

Q. Now I show you what has been marked Government Exhibits 6a and 6b for Identification. Is this the enlarged photograph you made of the print? A. Yes, sir.

Q. Which is it, both of these? A. Photograph B is the enlargement of this finger print here.

Q. The photograph marked Government Exhibit 6b for Identification is the large photograph of the print that you lifted from the rear view mirror? A. Yes, sir.

Q. Now then, I show you another photograph of the finger print marked Government Exhibit 6a for Identification. What is that? A. That is the right index finger of the, of an individual.

Q. All right, I will show you what has been marked Government Exhibit 1 for Identification and which has been introduced into evidence. Can you identify that? A. Yes, sir.

Q. And what is that? A. It is a finger print card of one Clayborne
91 Bynum.

Q. All right, did there come a time when you did something with or in regard to Government Exhibit 1 for Identification? A. Yes, sir.

Q. What did you do? A. I made a comparison between this finger print card and the suspect print taken from the 1955 Mercury.

THE COURT: I am not quite clear. What does 1a on the exhibit indicate?

MR. FLANNERY: I am going to clear that up now, Your Honor.

BY MR. FLANNERY:

Q. Did you make a comparison between one of the prints, between one of the finger prints on Government Exhibit 1 with the print you had lifted? A. Yes, sir, I did.

Q. Which finger print did you compare with the Government Exhibit 1? A. The right index finger.

Q. The right index finger of one Clayborne Bynum? A. Yes, sir.

Q. Did you make a photograph of the right index finger of Clayborne Bynum? A. Yes, sir, I did.

92 Q. What did you do with that? A. I made an enlargement of that photograph.

Q. Does that appear on Government Exhibit 6a for Identification? A. Yes, sir, it does, it is the right index finger of Clayborne Bynum.

Q. Is that Government Exhibit 6a for Identification on this enlarged photograph? A. Yes, sir.

Q. So on this enlarged photograph is the enlarged photograph of the right index finger print took from Goverment Exhibit 1 and 1b is the enlarged photograph you took from the one you lifted? A. Yes, sir.

Q. And you personally did this photographing and enlargement yourself? A. Yes, sir, I did.

MR. FLANNERY: Your Honor, at this time I wish to offer Government Exhibit 6a for Identification into evidence as Government Exhibit 6a.

THE COURT: It may be admitted.

(Document previously marked Government Exhibit 6a for Identification received as Government Exhibit 6a.)

MR. JOHNSON: I would like to object to it until I have an opportunity to cross-examine on it.

93 THE COURT: Oh, no, we do not proceed that way. You can cross-examine at the proper time.

BY MR. FLANNERY:

Q. For the benefit of the Court and the jury, did you make a duplicate copy of Government Exhibit 6a? A. Yes, sir, I did.

Q. Do you have one of them with you? A. Yes, sir.

Q. Would you hand me seven of those, please? (Witness passed counsel copies.) And those are exact copies of Government Exhibit 6a, is that right? A. That is true.

MR. FLANNERY: Your Honor, at this time I propose to make available to the Court a copy of this and I would like to pass six copies to the jury so the jurors may look at one and I have already given one to Mr. Johnson.

THE COURT: You may do so.

BY MR. FLANNERY:

Q. Now, Mr. Dion, what is the significance of the lines numbered one through fourteen which you have marked on each of these enlarged photographs of the prints? A. These lines are hand drawn and the figures represent the particular point there and the amount of points that lie in each finger print.

Q. Now, I would like to have you explain the significance of these points that you have marked off and we will start with point one. Will

94 you explain to the jury and the Court what is the significance, in your opinion, of number one, the line drawn one. A. Number one, the line is drawn to their end ridge.

Q. What is an end ridge? A. An end ridge is a ridge that is part of the finger print pattern that may come or enter upon one side. In case of an ending ridge will abruptly end somewhere in the pattern.

Q. Now do you find a similarity between the two prints as to characteristic one? A. Yes, sir, in photograph a, the photograph on the left being an enlargement of the inked print, you will find that point one also shows in photograph b, which is the suspect print taken from the 1955 Mercury, in the same location the two points line up identically.

Q. As to point two. Will you explain to the Court and jury the significance? A. Point number two is a BI.

Q. What is a BI? A. A BI is where two ridges may come together to form a single ridge or a single ridge may split forming two more ridges and point number two being a bifurcation in relationship to point one, number one lies directly between the two ridges, between point two, which is a characteristic.

Q. What is the significance of point three? A. It is an ending ridge and in relationship you will find that point four and five are close
95 by. The relationship of three to four is a single ridge. Looking at point three if you come down that ridge and count over one ridge you will find point four which is also an ending ridge.

Q. All right, as to point five, have you come to that? A. Point five in relation to point four you will find there are a certain amount of ridges between four and five which makes for the basis for your identification. It is the relationship between the two points, the difference between four and five would be six ridges and you will find the same points showing up in photograph B, which is a latent print, the same points show up and the count of ridges between any two of these points is identical. [let]

Q. Now/us pass on to the next characteristic six. Will you explain that to the Court and jury? What that means? A. Point six is an ending ridge in relationship to seven. Point seven is another bifurcation and you will find there are three ridges separating six and seven.

Q. Now as to point eight, what is the significance there? A. Point eight is an ending ridge and in photograph B you will find that same ending ridge and the ridge count between seven and eight there, one, two, three, and four ridges and both these characteristics show up in photograph B

identically.

Q. Now as to the characteristics in point nine, will you explain to the Court and jury? A. Number nine is also an ending ridge as is
96 number ten and the relationship between nine and ten there is three ridges and those same characteristics show up in photograph B, which is the latent print also.

Q. Now passing on to ten, what is the significance of that? A. Ten is an ending ridge and in photograph B that same ending ridge shows up and in relationship between ten and eleven they are separated by five ridges and the same characteristic shows up in print B which is your latent print.

Q. Now as to characteristic twelve, what is the significance of that? A. Point twelve is an ending ridge in photograph a and twelve is also an ending ridge in b and their relationship between thirteen is a dot, it is a raised piece of flesh, it has no direction, it is not classified as a ridge, we call them dots or islands.

Q. And a dot is found in the same position on each ridge, is that correct? A. Yes, sir.

Q. Now let us take fourteen, what is the significance there? A. Characteristic fourteen is another ending ridge. It shows up in photograph B and it is directly above point thirteen, or characteristic thirteen, and it is split by one ridge.

Q. After your examination of the print, the latent print lifted from the rear view mirror and a comparison of it with the right index print of
97 Clayborne, apparent on Government Exhibit 1, have you come to any opinion as to those prints? A. Yes, sir, I have.

Q. What is your opinion? A. The right index finger of Clayborne Bynum is identical with the latent print taken from the 1955 Mercury.

Q. In your opinion were both impressions made by the same initial right index finger of the defendant? A. Yes, sir.

MR. FLANNERY: That is all.

THE COURT: Is there any cross-examination?

MR. JOHNSON: Yes, sir.

CROSS-EXAMINATION

BY MR. JOHNSON:

Q. Now officer do you have the original taken off, have you got the original lifted? A. Yes, sir.

Q. May we see them, sir? Now Officer Dion, you indicated that you were formerly in the finger print department of the Federal Bureau of Investigation, is that correct? A. Yes, sir.

Q. Who was in charge of the Federal Bureau Fingerprinting Section when you were there? A. My immediate supervisor was Gerald Ingram.

Q. Do you know a gentleman by the name of Alex Shelder? A. No, sir.

98 Q. Do you know who set up the Fingerprint Section of the Federal Bureau of Investigation? A. No, sir, I don't.

Q. Is it or is it not true you did not use the method that the Federal Bureau of Investigation use to get this print? A. To lift the print off the stamp?

Q. Yes. A. I don't know what method they use.

Q. You don't? A. They use several different types, what they would use at that time, I wouldn't know.

Q. Don't you know as a matter of fact they specifically direct their agents not to lift prints?

THE COURT: Just a moment. I think what somebody else uses is not material.

MR. JOHNSON: If Your Honor please, I am trying to show, if I may.

THE COURT: No, you may not make speeches in front of the jury. You may come to the bench if you wish.

(At the bench:)

MR. JOHNSON: I am trying to show that the Federal Bureau of Investigation has a rule that an agent is never to lift a print because to lift a print you destroy the identity.

THE COURT: I do not know of any such rule.

99 MR. JOHNSON: I have investigated and found out.

THE COURT: What another agency does is not admissible into evidence.

MR. JOHNSON: Then this, his experience, Your Honor?

THE COURT: No. You have a right to ask him about the customary method but not about what one specific agency does.

MR. JOHNSON: That is what his training and so forth are.

THE COURT: You may not ask him about what the Federal Bureau of Investigation does or any other agency.

(Following bench conference:)

THE COURT: The Court will take its luncheon recess at this time.

(The Court recessed at 12:29, February 12, 1958).

100 AFTERNOON SESSION

February 12, 1958

1:45 P. M.

THE COURT: Was that one of the exhibits in evidence?

MR. JOHNSON: Yes, sir.

THE COURT: Well, when you get through with it, deliver it to the Clerk. She retains custody of all exhibits.

MR. JOHNSON: I don't think this has been introduced, but it has been identified.

THE DEPUTY CLERK: This is not in evidence.

MR. JOHNSON: This has merely been identified so far.

THE COURT: Very well.

MR. FLANNERY: May I offer it at this time, your Honor? I evidently overlooked offering it. I would like to offer it at this time.

THE COURT: What is it?

MR. FLANNERY: Government's 6 for Identification.

THE COURT: Very well, let it be admitted.

(The document referred to, previously marked Government's Exhibit No. 6 for identification, was received in evidence.)

THE COURT: Now, what is that?

101 MR. FLANNERY: This is a print lifted from the rear-view mirror of Mr. Good's automobile.

Whereupon

EDWARD JOSEPH DION

resumed the stand and testified further as follows:

CROSS EXAMINATION

BY MR. JOHNSON:

Q. Now, I noticed on this Government's for identification Number 6, there are other fingerprints. Did you identify those, sir? A. No, sir.

Q. Do you know whose those are? A. No, I do not.

Q. Did you make any attempt to identify them? A. No, sir; not after the original identification was made, no.

Q. I see. And I notice that this is bent in, sir. Who bent it? A. I did.

Q. And this is a photograph of what, sir? A. That is not a photograph, sir; that is the original print as lifted from the back of the rear-view mirror.

Q. I see. Well, all of these prints on the rearview mirror, are they all from the rearview mirror? A. No, sir. On the reverse side is the location from where the other prints were lifted.

102 Q. I see. Well, now, you say this is the original print? A. Yes, sir, the original lifting.

Q. Where is the thing that you lifted? A. The print you are holding in your hand is the original lifting. These photographs were made from that particular lifting.

Q. In other words, you pasted them on this piece of paper? A. No, sir, not pasted.

Q. Isn't there something pasted on this, sir? A. No, sir. The print is on the tape, and the powder that makes up the pattern of the print adheres to the tape, and the tape is placed against the white photographic paper for contrast only.

Q. Now, where is the tape? A. The tape in on that unexposed photographic paper; the white paper you have is the unexposed photographic paper.

Q. In other words, this object here is a piece of cellophane tape that you have placed against this photographic paper; is that correct?

A. That is true, yes.

Q. Now, tell me this: Is there anything about this piece of paper, or this piece of tape, that will tell the ladies and gentlemen of the jury,

103 and his Honor, where this print was taken from? A. After I lifted that print --

Q. No, sir. Tell me this, sir: --

THE COURT: Let the witness finish his answer. Proceed.

THE WITNESS: After I lifted that print from the mirror with the tape and the powder and placed it on that unexposed photographic paper, I wrote on the reverse side the location from which that print was taken.

BY MR. JOHNSON:

Q. You perhaps didn't understand my question. Is there anything on the front of this paper, other than what you put on it, is there anything about this impression itself, this tape, or this piece of photographic paper, that would tell these ladies and gentlemen of the jury and his Honor where it came from?

THE COURT: He told you that he put a notation at the time on the back of that exhibit, indicating where it came from.

MR. JOHNSON: I understand that, sir. That is on the back.

THE COURT: Well, it doesn't make any difference whether it is on the front or back. I think you have exhausted the subject.

104 MR. JOHNSON: I agree it wouldn't make any difference, but I wanted to know from him if there was anything about this tape impression, or the paper, photographic paper itself, that would identify where the print was taken.

THE COURT: He told you how he identified it. Now, that is enough.

MR. JOHNSON: If your Honor please, may I ask -- I was merely asking him if there was anything about this -- I don't want to know what his testimony is --

THE COURT: He told you he identified it by the fact that he made a notation on the back of the exhibit at the time. Now, I think you have

exhausted that.

MR. JOHNSON: May I make a tender at the bench?

THE COURT: Yes.

(A conference at the bench.)

MR. JOHNSON: I want to tender in evidence the fact that from this exhibit, other than this man's testimony, there is no possible way to tell where this print came from.

THE COURT: Well, no, you are wrong, because, and I don't know how you can tender that, because you don't know what his answer would be.

MR. JOHNSON: Your Honor has refused to let me ask him.

THE COURT: He testified he put a notation on the back at the time he made the print. That is enough.

105 MR. JOHNSON: Well, sir, will your Honor accept my tender?

THE COURT: What?

MR. JOHNSON: Will your Honor accept my tender that I want to show by this witness that other than what he wrote on the paper there is no way to identify it.

THE COURT: Well, that is enough.

MR. JOHNSON: Will your Honor accept my tender?

THE COURT: He has answered the question. Now, I am not going to allow sophistry or casuistry because cross examination is subject to reasonable control of the Court.

Let us proceed, gentlemen. You asked him how he identified it. I let you ask whether there was any other identification except his notation. Now, you may ask him that.

(Conference at the bench concluded.)

BY MR. JOHNSON:

Q. Other than your handwriting on the back of this Exhibit 6, is there any way from the front of it that the ladies and gentlemen of the jury, or his Honor, could tell that this came off the rearview mirror?

THE COURT: I told you I would exclude that question. Now, you identified by the fact that you put a notation on the back as to where it came from.

THE WITNESS: Yes.

106 THE COURT: When did you put that notation on there?

THE WITNESS: Immediately after the print was lifted from the mirror.

THE COURT: You personally lifted the print and personally put the notation on the back?

THE WITNESS: Yes.

THE COURT: That is enough. I will not permit any more waste of time on that.

MR. JOHNSON: May I note an objection to the restriction?

THE COURT: You know we just can not permit these things to run on and on endlessly.

MR. JOHNSON: If your Honor please, I think I could demonstrate why I asked the question by another expert.

THE COURT: I think that is enough identification.

MR. JOHNSON: Very well, if your Honor please.

BY MR. JOHNSON:

Q. As a matter of fact, could you not have photographed the print on the rearview mirror? A. As to the mirror being on the car at the time?

Q. Whether you could not have -- when you put your powder on the back of that rearview mirror, you saw a print, did you not? A. Yes, sir.

107 Q. Why didn't you photograph it on the back of the mirror? A. As to the mirror being on the automobile at the time, where I dusted and lifted that print, the mirror is directly in front of the windshield which has an area of about two inches from the windshield to the mirror itself. You could not get one of our fingerprint cameras, which we use occasionally, into that area to work. There was not room, and since the print was as good as it is, there was no need for a photograph.

Q. Is that the reason you didn't photograph it? A. As I recall, that was my main reason, not having the room to photograph, and the print being such a good print as it was, and the curvature of the mirror itself.

Q. Well, this was on the rear of the mirror, wasn't it? A. Yes.

THE COURT: Let me ask you this: Do you get as good a specimen by the process known as lifting the fingerprint as you would be photographing it?

THE WITNESS: I believe the process of lifting the print is better than any photograph, because you lift the actual print itself with nothing lost.

THE COURT: And the process you followed here was lifting the print?

THE WITNESS: Yes.

108 BY MR. JOHNSON:

Q. Now, when you lift a print, you mash the oils, don't you? A. Not that I know of, sir.

Q. Isn't a print that you take any place merely the oils from the pores of the ridges of the fingers? A. That is true.

Q. Well, when you mash an oil, don't you flatten it? A. I will assume what you say, if you mash it, yes, I suppose.

Q. Didn't you mash it? A. No, sir.

Q. Didn't you impress this cellophane tape on it and press it down so that you could get the impression off? A. Not on the impression itself, no.

Q. Didn't you put the cellophane tape on this print so that you could get all of the outline of the print? A. Yes.

Q. And then you put pressure on it to get that, didn't you? A. Not on the print itself, on the tape that I used, yes.

Q. Then the tape was against the oil, isn't that correct? A. The print is against the powder that adheres to the oil impression.

109 Q. And then you press that down so as to take it off? A. Not the fingerprint but the tape, yes.

Q. You press the tape against the powder so that you can get it off, is that right? A. The powder is on the print, and I didn't handle or touch the print.

Q. No, sir, I am not suggesting that you did. Precisely, didn't you put this tape on the impression and press it there so you could get all the impression off? A. On the two extreme edges of the tape that does not touch the fingerprint pattern or the impression, I put pressure but not on the fingerprint itself. There is a chance of destroying that print.

Q. Now, is it your testimony to this jury that these prints are identical? A. Yes, sir.

Q. They are identical, is that right? A. That's true.

Q. Now, if they are not identical in any detail, then they are not the same print; is that right? A. That is true.

Q. Well, now, I want to show you something about this print and ask you, have you got your copy of the print there? A. Yes.

110 Q. Now, what type of print is this called? A. The type of pattern?

Q. Yes. A. Ulnaloop.

Q. Now, with regard to what you call your point of identification, Number 4, may I ask you --

Your Honor, may I pass these to the jury?

THE COURT: No, you can not hand anything to the jury.

MR. JOHNSON: I think they have seen them, if your Honor please.

THE COURT: Now, do you wish to have them distributed to the jury again?

MR. JOHNSON: Yes.

THE COURT: Then let the Marshal distribute them. Have you got copies of the exhibits?

MR. FLANNERY: Yes, sir.

BY MR. JOHNSON:

Q. Now, you have a point on there marked four, do you not? A. Yes, sir.

Q. You see, following the line up to four is allegedly merely an unending ridge, isn't that right? A. Point four?

Q. Yes. A. Yes, sir.

111 Q. Now, I notice that in A, which is the verified print of it --

THE COURT: Don't tell him what you noticed. You can't testify. You may ask questions only.

MR. JOHNSON: Yes.

BY MR. JOHNSON:

Q. Now, in A, where you have point four indicated, it doesn't touch.

THE COURT: You may not make any statements. You have to ask questions. That is all.

BY MR. JOHNSON:

Q. Does point four touch the ridge to the right of it? A. In Photograph A?

Q. Yes. A. No, sir, it doesn't.

Q. Look at Photograph B. Does it touch there? A. No, sir, it doesn't.

Q. You say it doesn't? A. No, sir.

Q. In other words, the line that you mark as four on A does not touch it, whereas the line that you say is in four on B, you say similarly does not touch it? A. Neither point touches.

THE COURT: You mustn't do that, Mr. Johnson. He said that
112 neither one touches.

MR. JOHNSON: Very well.

THE COURT: I don't want you to transcend again.

MR. JOHNSON: Very well.

BY MR. JOHNSON:

Q. Now, at the top where four goes up into a type of loop, when it ends where it does not touch, the line immediately to the right is a circle, it goes up a loop and comes back, doesn't it? A. Would you repeat what you have asked again?

Q. To the right of that ridge that you say is a line that does not touch, the next line to the right, or ridge to the right, there is a kind of loop that goes up and comes back up and comes back down on B, is there not? A. Above point four?

Q. May I show it to you. Now, you identify what I am talking about, the area in which you are now directed, or first, do you identify what I am talking about, sir? A. No, sir. You are telling me something that just isn't.

Q. Do you identify what I pointed to? A. You showed me the area you are talking about.

Q. You know what I am talking about now then. Now, look at a comparable line on Photograph B, or rather on Photograph A. You say they are identical, sir? A. The two prints are identical, yes.

113 Q. But in this particular, are they identical, sir? A. In what particular?

Q. This particular formation that I showed you, is it your testimony that they are identical? A. Yes, sir; they are.

Q. I see. Now, with regard to point 6, you speak of that as being a what? A. Ending ridge.

Q. Ending ridge right next to it, to the right of the picture, on Picture A there is a line that goes up --

THE COURT: No, I have told you before you may ask questions but you may not make statements.

MR. JOHNSON: I was merely trying to identify it.

THE COURT: You have to put your questions in the form of questions and not make preliminary statements that way.

MR. JOHNSON: May I show him what I want?

THE COURT: No, you may ask your question.

MR. JOHNSON: If your Honor please, I am embarrassed to state that I don't know how to point out what I am talking about.

THE COURT: Oh, you may come close to the witness if you wish.

MR. JOHNSON: Thank you, sir.

114 THE COURT: Come close to the witness stand and point as you ask a question to what you refer to, but you can't make statements.

MR. JOHNSON: Very well.

THE COURT: No, you can not have any private conversations. Speak up so we can all hear.

BY MR. JOHNSON:

Q. Directing your attention to the ridge that is next to the right of the ending ridge at point 6, do you see what I am talking about? A. You are pointing to a ridge, yes.

Q. Is that a continuous ridge, and I am talking about this ridge to the right of point 6?

THE COURT: No, don't address the jury that way. You can only address the witness.

MR. JOHNSON: Will your Honor inquire of the jury whether they understand?

THE COURT: No, you can not do that. This is not the time to make your summing up speech. The time for that arrives at the end of the trial, and then you will have plenty opportunity to argue.

BY MR. JOHNSON:

Q. Does that ridge end anywhere, or is it a continuous ridge? A. Will you ask that again?

115 Q. The ridge to the right of point 6, is that a continuous ridge? A. It continues past point 6 and then stops.

THE COURT: Repeat your answer, please.

THE WITNESS: The ridge that this attorney is talking about is the ridge next to point 6, and it does continue past that point and stops at the end of the print.

BY MR. JOHNSON:

Q. Does it come down any place? A. No, sir; it does not.

Q. Now, look at the ridge to the left of point 6 and tell me whether that is a continuing ridge in point A? A. That is a continuing ridge also; yes, sir.

Q. Now, look at point B and tell me whether the same thing is true about point B? That is also a continuing ridge. Does the ridge right next to 6, doesn't it stop and isn't there a break in it at the top of what would be a loop? A. No, sir; the ridge next to point 6 makes a stop; it is an ending ridge.

Q. The point next to 6 is an ending ridge? A. The ridge next to

point 6 is an ending ridge; that is the ridge next to the right.

Q. No, I am talking about the one to the left. A. The one to the left is a continuous ridge.

Q. Now, does it continue in print B? A. Yes, sir; it does.

116 Q. Now, can you tell this jury, right at the apex of the ridge to the left of point 6, what is the white spot that interrupts the line there if it is not an end or break? A. That white spot could possibly be dirt or some other foreign substance, or a place where the oil did not adhere.

Q. In other words, it isn't identical with this in that regard? A. No, sir; the photograph, print B --

THE COURT: Speak up. I notice a tendency to speak low when the witness and counsel are close together.

THE WITNESS: In print B, now I understand what the attorney is striving for, I believe. I believe I do. Next to point 6 is an ending ridge, and to the right there is also an ending ridge I have not marked, and that ridge shows up in both photographs, but in the ridge to the left of point 6 there is a ridge that continues on one side of the pattern and rises and curves in the center and flows out on that opposite side as a continuous ridge.

BY MR. JOHNSON:

Q. Yes. A. And also in print B, but there is a break in that ridge that sections that ridge into two.

Q. I see. A. What causes it I do not know.

117 THE COURT: Is there any significance in that break?

THE WITNESS: No, sir. There are several breaks in this print like that.

BY MR. JOHNSON:

Q. What do you mean there are several breaks in the print? Several points of difference between one print and the other? A. No, sir, that is not what I mean at all.

Q. But it is not identical in that regard, is it? A. I don't understand what you are driving at.

Q. Well, isn't your testimony now that the two points on this ridge, to the left of point 6, are not identical in the prints; isn't that your testimony? A. That ridge is broken in print A. The ridge is continuous. In print B, in that particular ridge you are talking about, it shows up as a white space; yes, sir.

Q. Well, then, they are not identical in that regard? A. No, sir.

Q. I see. But all fingerprints are identical if they are the same; aren't they? A. The characteristics of such prints are identical, yes.

Q. Well, these two prints were allegedly made by the same man, weren't they? A. Yes.

118 Q. They should be identical, shouldn't they? A. Yes.

Q. They are not identical in this particular, are they? A. In that particular ridge.

THE COURT: Is there any explanation for that?

THE WITNESS: Yes, sir; there is.

THE COURT: What is the explanation?

THE WITNESS: Several explanations, of which I don't know for sure what the cause was in this particular print, but dust on the surface, a layer of dust will act as an insulator, a small speck line across that ridge that was between the contact of the print and the surface it touched will act as an insulator in that print, or the oil from the finger may not have excreted in that particular spot.

You have capillary glands here in the ridge of the print itself, and if it has a piece of dirt stuck in that particular gland you will not excrete oil and not leave that portion of the print.

THE COURT: But in your opinion that does not detract from the identity of the two prints?

THE WITNESS: No, sir.

BY MR. JOHNSON:

Q. How can we tell the other breaks are not the result of a similar thing? A. Other breaks?

119 Q. Yes. You say there is an ending ridge, and it is not connected in one place. How can I tell there wasn't a piece of dirt there also?

A. Continuing on into that area where that ridge should lie, there is no area at all, no evidence of a ridge there, completely blank.

Q. I see. Now, how can I tell whether there was a piece of dirt or object that stopped you from having it adhere to this tape? Wouldn't, if there was merely a piece of dirt there to prevent the tape from taking it, wouldn't a photograph have shown the dirt? A. I don't believe it would have, if it were that small; no, sir.

Q. Well, it would show everything in here as small as a dot, wouldn't it, the photograph? You take pictures of fingerprints, don't you? A. Yes.

Q. It shows everything, doesn't it? A. Everything that is on the print; everything the camera could see.

Q. Why wouldn't a photograph then have shown whether this was a continuing ridge or not? A. If that dirt was on the finger, as the finger was placed on the surface, if it had the piece of dirt on the finger
120 it could very well have taken the dirt with it when the finger left the surface.

Q. Then it would have shown up as a white spot, or how would it show up? A. It wouldn't show up, being that the print is in black and white, that the powder I used was copper against a white background, I don't know how that dirt could show up. I don't know what form it would take since I wasn't there when the finger was placed on the mirror.

Q. Could you tell if you were there? A. Only by detailed study of it.

Q. Didn't you make a detailed study of the print? A. Of the print, yes, but not when the print was placed on the mirror at the time it was placed there. I wasn't there at the time.

Q. Well, being there would have told you that? A. I [do] not know, unless the circumstances were there and I could answer then.

Q. Then you could never tell us whether you were there or not; your being there would be of no significance, would it? A. I don't know, unless the circumstances were here in front of me. I couldn't answer that in one form or another.

Q. Now, at point 5 you point to an island that is clearly located in point A. Is there a counterpoint of that island in photograph B? A.

121 Point 5 is an ending ridge. It is also a short ridge. The point I was making of that particular characteristic was the northern tip of that ridge. In the inked print it shows up as a short ridge.

Q. We can't tell from point B whether there was a short ridge there or not, can we? A. No, sir.

Q. So then that point of identification isn't certain, is it? A. Yes, sir; it is, that point.

Q. That much of it? A. Yes.

Q. It may not be that down below, may have gone all the way down and then a longer print on the B print? A. I don't know.

Q. You can't tell? A. Can't tell.

Q. So that point of identification is only partially true, is that right? A. No, sir. The point I have pointed out is the northern end of that ridge which in itself is a characteristic, and I have so pointed it out.

The lower half on that photograph B, that surface never touched that mirror. There is no ridge at all showing up in that righthand corner,

122 whereas in photograph A is an inked print taken by an experienced fingerprint man who retains all the print with ink purposely to obtain a good, clear, legible, full print, whereas this latent print is a portion of the print.

Q. I see. Now, can you explain to this jury then --

THE COURT: You mean the Court and Jury?

MR. JOHNSON: I beg your Honor's pardon.

BY MR. JOHNSON:

Q. Can you explain to the Court and ladies and gentlemen of the jury, why it is that fingerprint A, which is supposed to have the full, complete print, shows that there is a continuous ridge in one area and a break just to the right of point 3? A. May I have that again, sir?

Q. Just to the right of point 3 -- A. Yes.

Q. --there is a loop that has a break --

THE COURT: No, don't make any statement. You may ask questions.

BY MR. JOHNSON:

Q. Is there or is there not a break in the loop to the right of point 3 on photograph A? A. To the right of point 3 is a ridge.

Q. Yes. Now, that is not joined together, is it, sir? A. No, sir;
123 it is not.

Q. That is supposed to be a complete and full print designedly made so by the man who took the print, isn't that so? A. I will say that you don't make a print; you reproduce the print with ink on paper.

Q. So, you can get a full print, isn't that true? A. Yes.

Q. Well, why is it then that in Photograph A that loop to the right of point 3 shows a break in it which should be a full print, whereas in photograph B there does show a complete loop? A. No, sir. That area, or the ridge, two ridges over from point 3 is an ending ridge, above that another ending ridge. The same way in photograph B you have point 3 and skip a ridge, and you have an ending ridge, and you have another ending ridge above that.

Q. I was only talking about the little loop ridge in photograph A; I am not concerned about any other ridges. There is a loop that goes up to the top that has a break in the top of it --

THE COURT: Don't tell him what the ridge is. You may ask him.

MR. JOHNSON: I beg your Honor's pardon.

THE COURT: You must not do that.

124 MR. JOHNSON: I apologize.

THE COURT: Otherwise you become a witness.

MR. JOHNSON: Yes.

THE COURT: Without qualifying as one.

MR. JOHNSON: Yes.

BY MR. JOHNSON:

Q. Now, to the right of point 3, is there a break in the loop of the next two ridges? A. Sir, you are calling that a loop and that is not a loop.

Q. Whatever it is. A. There are two ending ridges there.

Q. Looking at photograph B, tell us where the similar break is in photograph B? A. That line I have drawn with ink, denoting or pointing to point 3 itself, the ending ridge, above that line are the same two ending ridges that lie in photograph A.

Q. I see. Are they joined together in photograph B? A. No, sir.

Q. Now, with regard to -- do you know whether that rearvision mirror is removable or not? A. I only assume it is removable; I did not remove it.

Q. You don't know whether it is removable? A. No, I don't know for sure.

Q. You didn't try to move it? A. No, sir.

125 Q. Now, you said you found some other fingerprints in and about this car; is that correct, sir? A. That is true.

Q. Now, did you make any other impressions?

THE COURT: I suggest that you give the exhibits back to the Clerk now. There is always the danger of their being inadvertently misplaced among counsel's papers.

MR. JOHNSON: Surely.

BY MR. JOHNSON:

Q. Did you take any other fingerprints? A. On that automobile?

Q. In this case? A. Yes, sir; I did.

Q. Where? A. To the best of my recollection, from the ventilator glass; that would be the short triangular shaped window on the left, and I believe on the upper molding on the outside body of the car.

Q. Is that all, sir? A. That is all that I can recollect at the time, yes.

Q. Did you take any other fingerprint at any other time? A. On that automobile?

Q. No, in this case? A. No, sir.

126 Q. Did you take any impressions off of Bynum's car? A. No, sir.

Q. Did you look at his car? A. I photographed it.

Q. Did you see any fingerprints on it? A. No, nor did I look for any.

Q. You indicated to this Court and Jury that no two identical fingers are alike; is that correct? A. Can I have that again?

THE COURT: You mean, a left and right index finger will be different?

THE WITNESS: Two different fingers?

BY MR. JOHNSON:

Q. No two different fingers are alike, is that correct? A. I am asking you to ask me that again, please.

Q. I beg your pardon. Is there a difference between -- does each individual finger have a different fingerprint? A. Yes, each individual finger has an individual fingerprint.

Q. Is it possible to compare an index finger with another finger? A. Being two different fingers?

Q. Yes. A. You could compare them, yes.

127 Q. You get points of similarity? A. Yes, you could get points of similarity.

Q. So this might not be a right index finger, or it might be -- A. No. I said you could get points of similarity.

Q. How many points of similarity could you get? A. As many as you would have, I suppose.

Q. As many as you got here, couldn't you? A. Of similarity, yes.

Q. But if there were different fingers of different people, there would be some points of similarity, wouldn't there? A. Sure.

Q. And you would testify if you were called as an expert to point out the points of similarities; if I had an ulnaloop fingerprint you would point out some points of similarity between my index finger and the finger you have there, can't you? A. Similarities, yes.

Q. And there would be some ending loops, some ending ridges, and some island that you might be able to point out to be the same; isn't that correct? A. Not the same but similar.

Q. Similar? A. Yes.

128 Q. The same thing you have here, isn't it? A. No, these are identical here.

Q. I see. But they would be similar ones. Now, what difference could you point out to this Court and to the ladies and gentlemen of the Jury if you found an ending ridge in my hand that would be different from the ending ridge from what you found in this fingerprint? A. Would you repeat that, please?

Q. Well, you have pointed out to his Honor and to the ladies and gentlemen of the Jury that there is an ending ridge in both -- among other things -- an ending ridge in these two fingerprints. You say that they are shaped the same, they look the same, and they exist in these two fingerprints. Is it possible to have an ending ridge in an ulna fingerprint, similar ulna fingerprint to two different people? A. Have an ending ridge in a fingerprint or prints of two different people?

Q. Yes. A. Yes, you could have an ending ridge.

Q. You can. Now, you have four ending ridges here, don't you? A. Yes, that is true.

Q. So, you could have the four too, couldn't you? A. Or more.

Q. Or more.

129 So the four points of identification that point out ending ridges may occur in people who are not identical; isn't that correct? A. Let me have that again, please?

Q. You may have four ending ridges in individuals who are different in their fingerprints that are similar; isn't that correct? A. If these ending ridges are not in relationship to each other.

Q. I see. Now, you have put the ending ridges not in relationship to each other, but you put them in relation in this case to other continuous ridges; haven't you? A. No.

Q. You put them in relation to each other? A. The points are in relationship to another point. You can take any one of these points I have marked off -- on others I have not marked off, that are still in the print, and if you count to one point to another point, from 14 to 5, or from 3 to 7, you will find the same amount of ridges separating these

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points to be identical in each print in relationship to each other.

Q. Have you finished, sir? A. If that is all you asked me, yes.

Q. Now, with regard to this fingerprint, I notice several smudges on this fingerprint B that are not on fingerprint A; is that correct, sir?

130 A. That is true.

Q. That is because this was not done carefully like A? A. A is purposely put down in order to get a good, clear, legible print, although in A the upper righthand corner is smudged with an excess of ink, yes.

Q. I notice also in A that the loops are wider, and the aspects show they are not as sharp in A as they are in B. What is the reason for that, sir? A. I can assume in placing an inked print, that is one a fingerprint man would roll with ink and put down on paper, the inked print, a certain amount of pressure is applied, not too much, not too little, but a certain amount of ink is supposed to be used, whereas in B, if you lift something heavy or put a great deal of pressure on whatever you touch you can squeeze these ridges together which will cause one flat surface blob, and the powder may not adhere, or if it does adhere it will adhere to the whole thing.

Movement will cause a print to smudge, or the type of surface that the latent print happens to be on. The surface could be flat, it could be smooth, could be clean, could be dirty; it could have fine lines in it, cut glass and whatnot.

Q. So, it would be important to know what kind of surface you are working with, wouldn't it? A. For what reason?

131 Q. To know whether it was dirty, to see whether there were other smudges on it, to see whether there was anything to disturb the print? A. You are asking me if it is important to know, but I can not state for what reason. If the print is there, regardless of the condition of the surface, if the print is there and it is a good print, you are going to lift it.

Q. Well, now, regardless of that, sir, it would be important to know --

THE COURT: No. Please do not make statements.

BY MR. JOHNSON:

Q. Would it be important to know the type of surface, whether there was dirt or anything else to disturb a print on the surface? Would it be important to know that? A. Yes, it would, depending upon the surface, whether the surface was oily, like a part of a machinery of an automobile, under the hood of an automobile, or wax surface, or a rough wooded surface.

Q. And a photograph would have shown that, would it not? A. I assume it would show part of it, yes.

Q. You take pictures of fingerprints on objects, don't you? A. Yes, I photograph many prints.

Q. And you are trained in that, sir? A. Yes, sir.

132 Q. Then you could have, in this case, if that mirror were removed, have removed it, taken it to your laboratory, taken a picture of the exact condition to show the ladies and gentlemen of the Jury and this Court that this particular fingerprint was, as a matter of fact, on the back of that mirror; couldn't you? A. Had the circumstances warranted me taking a photograph of that print, had it been in the condition, poor condition or average condition, or for some reason had I thought that I would have needed to photograph it, I would have; but since the print was such a good print, as it was, then it was best to lift that particular print.

Q. Then it is your testimony, sir, that rather than to have photographed this print and shown it to the Court and ladies and gentlemen of this Jury, actually on the back of that mirror you thought, in your own judgment, that you did not have to do that? A. That is not the reason I did not photograph it; no, sir.

Q. Now, I want you to look at Government's Exhibit No. 6. Tell the ladies and gentlemen of the Jury whether you put the date, the hour, or the time that you did that on there? A. Not on the reverse side of this print; no, sir.

133 Q. Did you put it on the front side? A. No, sir.

Q. Did you put it anywhere? A. Yes.

THE COURT: Put what?

MR. JOHNSON: The date and the time.

THE COURT: Well, now, it speaks for itself. If it is there, it is there; if it is not there, it is not there.

BY MR. JOHNSON:

Q. Did you make any written reports of this, sir? A. No, sir; I made a fingerprint jacket that holds that latent fingerprint; it is not a written report.

Q. Is there any formal report that you made that you wrote and signed about this, sir? A. No, sir, no formal report.

Q. Any written report, whether formal or informal? A. As you process a scene, object, article, location, area, address, as you visit the scene we have a book, a latent print book at which time if we are outside on a particular scene, or in this case I went downstairs to the basement to check this particular car, when I got through I came back upstairs and if I had retained prints I made a jacket and put the prints in the jacket and placed on our latent print book that certain object, area, location, was dusted, whether or not prints were obtained, and signed my name on it. It is our latent print book.

134 Q. Does that contain the date, hour and time you did it? A. That contains the date. As to the time, I do not know about the time. It does have the date and my signature on it, as this jacket does too.

Q. Now, where did you obtain your copy of print A? A. That would be the fingerprint card, sir.

Q. I imagine print A is taken from the fingerprint card? A. Yes.

Q. When did you obtain your copy of print A? A. I believe that was on about the 12th or 13th of August. That was placed on my desk.

Q. In the meantime your duties at the police department, did they involve classification of prints? A. Yes, they do.

Q. And what, if anything, did you do when you got your copy of print B, other than what you have told this Jury and his Honor? A. May I have that again, please?

Q. What, if anything, other than what you have already told this

Jury and his Honor, did you do in relation to the print B that you obtained, other than what you have already testified to? A. Print B?

135 Q. Yes.

THE COURT: I think you ought to make your question a little more definite.

BY MR. JOHNSON:

Q. Did you do anything else with print B other than what you have talked about? A. No, sir.

Q. Nothing in relationship to it? A. Lifted and photographed the print.

Q. You don't process prints then? A. Processed to what extent? I couldn't answer the question the way it is.

Q. As to classifying them. A. Latent prints?

Q. Yes. A. There is a possibility you can process latent prints.

Q. Did you or did you not do so, sir? A. Not with this, no.

Q. Is that the normal procedure? A. Yes, sir.

THE COURT: Are you through with this witness?

MR. JOHNSON: Yes, sir.

REDIRECT EXAMINATION

BY MR. FLANNERY:

136 Q. Are there any dissimilarities between these prints A and B, in your opinion? A. No, sir.

Q. Are there any apparent dissimilarities such as the lawyer tried to point out?

MR. JOHNSON: I object to the clarification, if your Honor please. I have not tried to point out any dissimilarities, myself. I have tried to ascertain from the witness--

THE COURT: Just a moment. Are you objecting to the question?

MR. JOHNSON: Yes.

THE COURT: On what ground?

MR. JOHNSON: He referred to me in his question.

THE COURT: The reporter may read the question.

(The question was read.)

THE COURT: Suppose we strike the words "that the lawyer tried to point out."

THE WITNESS: There are smudges in the latent print caused by pressure or the surface or foreign matter that do not show up in the inked print which we take and roll as a full ink print in the office.

BY MR. FLANNERY:

Q. Would that be because the ink print was taken under ideal conditions by an expert in the identification bureau?

MR. JOHNSON: Objection.

137 THE COURT: On what ground?

MR. JOHNSON: It is a leading question.

THE COURT: Objection overruled.

THE WITNESS: Yes, sir. The print A is taken under ideal conditions, whereas the print B we can only take them as we find them. We have no control over the latent prints at all.

BY MR. FLANNERY:

Q. Based on your expert opinion, and the experience that you have gained in 11 years in looking at hundreds of thousands of prints, it is your opinion that the print of this defendant is the print lifted from the car?

MR. JOHNSON: Objection.

THE COURT: Overruled.

THE WITNESS: Yes, it is.

MR. FLANNERY: Thank you.

THE COURT: Mr. Dion, in analyzing and comparing fingerprints, is there any rule or practice as to how many points of identity or similarity must be discovered between the print of the suspect and the questioned print before you reach a conclusion that they are identical?

THE WITNESS: I believe the Courts --

MR. JOHNSON: If your Honor please, I object to that.

THE COURT: What is the practice among fingerprint experts, if there is one?

138 THE WITNESS: Yes, the fingerprint experts would like to have eight, ten, twelve, or fourteen. You can mark off many, many more, but after a certain point it does give no more weight to the print.

THE COURT: Here you have fourteen?

THE WITNESS: Yes, I have fourteen, but there are more in the print which I have not marked off.

THE COURT: Well, do you know if you need as many as fourteen?

THE WITNESS: No, sir; you do not need that many.

THE COURT: What is the least number that you need?

THE WITNESS: Eight, depending upon the circumstance, location, and type of characteristics, and the amount of area you have to work in. You could have eight or ten or even seven and still have an identification.

THE COURT: Anything further with this witness?

BY MR. FLANNERY:

Q. Are there more than the fourteen that you marked off here?

A. Oh, yes, sir; there are.

Q. And is there any reason why you did not mark off more than fourteen?

MR. JOHNSON: I object to that, if your Honor please.

THE COURT: Overruled.

139 THE WITNESS: No, sir; there is no reason. I picked out fourteen; I picked out the point that would not lie in the wake of an amount of area where I would draw this line as an aid to pointing out or bringing these points out.

I would not draw an ink line across another point, so I stayed away from points that were awful close together where I might override with ink, therefore, I stayed away until, or rather, I stayed out in the outlying points. Some points are inside.

MR. FLANNERY: Thank you.

(Witness excused.)

MR. FLANNERY: The Government rests, your Honor.

MR. JOHNSON: May we approach the bench.

THE COURT: Yes.

(Conference at bench:)

MR. JOHNSON: If your Honor please, I am going to move for a directed finding at this time. There has been no testimony upon which a jury could believe beyond a reasonable doubt that this crime has been committed in the District.

THE COURT: I will deny the motion.

MR. JOHNSON: The only corroborative circumstance was that whatever happened in the District of Columbia was the unauthorized use of a car or kidnapping.

THE COURT: Well, I am going to deny the motion. Of course the fact that the robbery is not contradicted, and the evidence connecting the
140 defendant with the robbery consists of three items, as I see. First, that the car used in the robbery was the defendant's car, and second, that the victim of the robbery spilled some sugar on the floor of the car, and sugar was found on the floor of this car; and third, that the defendant's fingerprint is on the rearvision mirror of the victim's car. That is enough to go to the jury.

MR. JOHNSON: Now, I am placed in this position, your Honor. I am unable, at the present time, to tell you, because there has been no disclosure of how this man came to the precinct, or came into arrest. So I am unable to tell you whether the man was improperly arrested, whether any of this evidence was admissible against him.

THE COURT: I do not care whether he was properly or improperly arrested, because there has been no confession from the defendant offered in evidence.

MR. JOHNSON: His fingerprint was taken from him at that time.

THE COURT: Well, in the first place I should hold that on the testimony of the officers the arrest was proper. There was reasonable suspicion. That is the way probable cause for making an arrest on a felony charge was defined just a few weeks ago by the Court of Appeals, reasonable suspicion. Of course not just any suspicion, but I think it is reasonable suspicion when a man's car is found to have been used in a

141 robbery justifying the arrest, so I would hold that it was probable cause for the arrest and the arrest was legal.

MR. JOHNSON: If your Honor please, I would like to point out that that wouldn't have been true in this case, because they could not have known that the car was used in the robbery until after his arrest.

THE COURT: Well, no, they knew the car was used in the robbery before his arrest. No, I am not going to split hairs, gentlemen. I think this was a valid arrest, and irrespective of that, the fingerprints were properly obtained.

You know, Mr. Justice Holmes, who of course was a great liberal, but in the true sense of that word, not with a capitol "L", held in a well-known opinion that a privilege against self-incrimination applies only to oral testimony or to documentary or use of documents. It does not apply to testimony of the body.

For instance, in the case in which that point was decided, the police put a sweater on a suspect and the point was raised that he was being compelled to be a witness against himself, and he said, "Oh, no."

So, fingerprinting is a recognized procedure. Every one arrested on a serious charge is fingerprinted. So we will proceed.

(Conference at bench concluded.)

MR. JOHNSON: I call Officer Antonelli, the police officer that Mr. Flannery called and excused.

142 Whereupon

DETECTIVE VINCENT ANTONELLI

was called to the stand as a witness by counsel for the defendant, and, having been first duly sworn, was examined, and testified as follows:

DIRECT EXAMINATION

BY MR. JOHNSON:

Q. Now, did you have an occasion, Mr. Antonelli, to take a statement -- first, did you have an occasion to talk to Clayborne Bynum?

A. Yes, I did.

Q. Did you have a conversation with him about whether he was involved in this crime at all or not? A. Yes.

THE COURT: When was that?

BY MR. JOHNSON:

Q. Was that after he was in custody? A. Yes.

Q. Do you understand how he got into your custody? A. Yes.

Q. How did he get into your custody? A. Do you want me to tell the complete story of how he got in my custody? .

Q. How he got in your custody.

THE WITNESS: Is that permissible, Your Honor?

143 THE COURT: You may answer.

THE WITNESS: I had received reliable information in reference to a Maryland tag. The tag number was Maryland JK 8150. Checking with the Maryland authorities in Baltimore, Maryland by phone, I found out that this tag number was listed to a Clayborne Bynum. At that time there was an address given on River Road in Bethesda, Maryland. I then went to the Montgomery County Police out towards Bethesda and requested some help there, since we were in Maryland, and they came up with the same information that I had, that this man here, instead of living at the address that we went to, which was an icecream and soft drink place, he had merely worked there at one time.

They had an address on their book of the 400 block. I think it is 50th Street, Northeast. We then went to the 400 block of 50th Street, Northeast, out in Deanewood. We scouted the immediate area looking for this late model Oldsmobile, about a '50 Oldsmobile, with this Maryland tag. We could not locate the car. We checked the telephone directory, and under the name of Clayborne Bynum found a name registered at the Dunbar Hotel with a telephone number.

We went directly to the Dunbar Hotel, inquired there, and found out that Clayborne Bynum had lived there but he no longer lived there.

BY MR. JOHNSON:

144 Q. Is this how you got custody of him?

THE COURT: Let him finish his answer. His answer is responsive.

MR. JOHNSON: May I suggest that it is not responsive.

THE COURT: I think it is responsive. You may proceed.

THE WITNESS: We checked with the Dunbar Hotel and found that he had moved approximately two months prior to our checking. We went back to the address on 50th Street, Northeast, in the 400 block, to see if we could locate the car again. The car wasn't there.

We came directly back to the robbery squad office. There I typed an interstate teletype to the local and interstate, to all police forces.

MR. JOHNSON: If your Honor please, may I suggest that this is not responsive.

THE COURT: I do not believe you need to read the teletype. Do you object to that?

MR. JOHNSON: Yes.

THE COURT: Sustained.

THE WITNESS: Due to this teletype that was sent out, the police officer in the 14th Precinct -- this was sent out after midnight, Wednesday, which would have been about August the 7th.

145 At approximately 3:00 or 3:30, Friday, August the 9th, Clayborne's brother, his twin brother by the name of Kenneth, was picked up by the police officers in the 14th Precinct operating his car, which was wanted in this lookout. He was taken to the 14th Precinct. There he produced his identification of Kenneth Bynum.

A short time later they received a phone call. The officer who answered the phone said they had a Kenneth Bynum in custody, that he would need $10. With that, this defendant here went to the 14th Precinct to put up $10 collateral for his brother, and at that time he was arrested and sent down to the identification bureau, Metropolitan Police, at 300 Indiana Avenue.

I was notified at home, since it was my day off, and I came into the office around 7:00 p.m. that day. At that time there I saw Clayborne Bynum.

BY MR. JOHNSON:

Q. Now, on the 7th, you went there at 11:30 at night; is that correct, or 12:00 or something at night; isn't that right, to Mr. Good's house? A. No, sir; it was on the 6th.

Q. It was the morning of the 7th, wasn't it? A. No. We received a call at 11:20 p.m. on the 6th.

Q. You got there before midnight? A. Yes.

146 Q. Now, did at any time -- you said you went to the Maryland Police, and you went all over the District of Columbia hunting for this defendant. Did you ever try the Metropolitan Police Department? A. Yes, sir.

Q. Didn't you receive the information that somebody other than Clayborne Bynum --

THE COURT: I am going to ask counsel to come to the bench.

(Conference at bench:)

THE COURT: The Court would like to inquire of counsel what is the relevancy of this line of inquiry?

MR. JOHNSON: I tried to stop him, if your Honor please.

THE COURT: His answer was responsive. You can not let a witness start an answer and then just because the answer isn't favorable stop him in the midst of it.

MR. JOHNSON: I don't think it was unfavorable.

THE COURT: It shows very good police work.

MR. JOHNSON: That is what I want to ask him about, your Honor.

THE COURT: I do not think that is in issue here. What are you trying to bring out?

MR. JOHNSON: I am trying to bring out that on the 7th, or thereabouts, that the Police Department had this car in their custody.

147 MR. FLANNERY: This man is talking so loud the Jury can hear.

MR. JOHNSON: This car was in the custody of the Police Department, and some one other than Bynum was in it.

THE COURT: Do you mean that somebody else was in the car?

MR. JOHNSON: Yes.

THE COURT: When the car was seized?

MR. JOHNSON: Yes, this car used in this robbery; somebody was in it, and the police arrested those people and had them in a precinct where they put up collateral.

THE COURT: Well, I think that is admissible, but eventually what are you trying to show?

MR. JOHNSON: That this man wasn't there. He did not do this.

THE COURT: You mean you are trying to show somebody else committed the robbery?

MR. JOHNSON: Yes.

THE COURT: You have a right to do that, but then get to the point. You can not use this remote approach.

MR. JOHNSON: Yes, sir.

(Conference at bench concluded.)

BY MR. JOHNSON:

Q. In your investigation, didn't you determine or find out that
148 shortly after this crime had been committed two men were in this automobile and were arrested by the D. C. Police? A. Shortly after this incident had been committed, sir?

Q. The crime, yes. A. How do you want me to answer that?

Q. Yes, or no.

THE COURT: Now, just a moment. You may answer this in your own way. You can not pin a witness down to a yes or no.

You know, some people have an idea there is a rule of law that a witness must answer yes or no. Sometimes that would not be enough for a complete or accurate answer. Every witness has a right to answer a question in his own way, provided the answer is responsive.

MR. JOHNSON: Yes.

THE COURT: You may answer the question.

MR. JOHNSON: May it please the Court, may he answer yes or no and then give --

THE COURT: No. He may answer in his own way.

THE WITNESS: Your Honor, we received information from the defendant, Clayborne Bynum--

THE COURT: Speak loudly so every one can hear you.

THE WITNESS: The story that he told me, after he had been in the robbery squad office a few minutes, was that a man by the name of

149 Arthur Jones, who has borrowed his car on other occasions, was using his car that night of the robbery. This Arthur Jones -- we had a photograph on file of him. We showed him the photograph and asked him if this was the Arthur Jones, and he said that it was the same Arthur Jones.

From Bynum's own mouth, in the presence of his brother in the robbery squad office, he stated that Arthur Jones had his car, that it broke down somewhere in the Southeast section around Number 11 Precinct; that while he was in the precinct, Arthur Jones had been arrested by a Private Bowie of Number 11, and this would be the early morning hours of the 7th; that he heard a lookout come out for the car and the tag number and the occupants. He then contacted Clayborne Bynum by telephone and told him that the car had broken down over there, so that morning around 11:00 o'clock, Thursday morning, Clayborne got in touch with his older brother who has an older automobile. They in turn met this Arthur Jones at 6th and H Street, Northeast, when he got off of a bus. There Arthur Jones directed him to this vicinity over in Southeast where there was an apartment development and told him there was trouble with the car, the car wouldn't start. He gets in the car and starts it right up. As they drive away, Arthur Jones, from Clayborne's own mouth, tells me he had been in the precinct, and while he was being booked he heard the lookout for the car and the occupants and that was the one reason he ditched the car over there.

150 So, I told Clayborne, I said, "Well, how come you let your brother drive the car when you knew the car was wanted by the Police Department for investigation of this armed robbery?"

He said, "I don't know." And that was all he would tell me.

MR. JOHNSON: Well, now, your Honor, I would like--

THE COURT: Before you ask the next question, I think we will take our usual mid-afternoon recess.

(Whereupon a brief recess was taken.)

THE COURT: Proceed, Mr. Johnson.

BY MR. JOHNSON:

Q. Now, Officer, I don't recall your answer to my question, so with the Court's permission I would like to repeat it. I did not hear an answer to it.

THE COURT: You may repeat the question then.

BY MR. JOHNSON:

Q. Did you or did you not find out that this car, license number, JK --

THE COURT: No. You can ask him whether something happened. You can not make a statement for which there is no basis in the evidence.

MR. JOHNSON: I see.

BY MR. JOHNSON:

151 Q. Did you find out that this car, JK 8150, had been in police custody on the morning of August the 7th?

THE COURT: Now, I am going to strike that question out for the reason I stated. You can not make an assumption in the question. You can ask him whether he found out --

BY MR. JOHNSON:

Q. Did you find out whether this car had been in police custody on December the 7th or 8th? A. To the best of my knowledge, no, sir; the car wasn't in custody.

Q. Do you know whether Jones has a permit or not? A. I called over to Number 11 Precinct.

Q. You were talking in reference to Arthur Jones? A. I called by telephone and I found out -- I think he posted $5 collateral on a traffic charge. I don't know what car he was operating.

Q. The traffic charge always has the automobile license on it, doesn't it? A. Not necessarily. If a police officer looks up a man and brings him directly into the precinct, they book that man in the precinct, and all they put in there, if it is a violation of turning from the wrong lane, he doesn't give that man a ticket and fill in all the information. You just take that man's name, address, age, and so forth, where he works, the amount of collateral posted, and whether he goes to Court or forfeits.

152 Q. Suppose it was failing to exhibit the registration, it would have that in there, wouldn't it?

THE COURT: Well, now, I believe you are going off on a fishing expedition. If you have any testimony to bring out, you may do so, but you may not just go exploring like that.

MR. JOHNSON: I am not exploring, your Honor.

THE COURT: That is what you are doing. You may not mean to. After all, this trial has taken longer than it should have.

MR. JOHNSON: It is very difficult, Your Honor.

THE COURT: I am allowing you more leeway than I would ordinarily because of the seriousness of the matter, but even so we must have terminal facilities.

MR. JOHNSON: May it please the Court, may I ask the Court this? I think I understand what your Honor's ruling is. I have this information, and I would like to elicit this from the officer.

THE COURT: Come to the bench then.

(Conference at bench:)

MR. JOHNSON: I have the information that on the early morning after this robbery this car was brought to a precinct in the District of Columbia, along with the occupants; that Arthur Jones was driving this car; that at that time Bynum was not in the car; that Arthur Jones did not have the registration for the car which is registered in the name of

153 Bynum, and because he did not have the registration for the car he was charged with failing to exhibit registration.

THE COURT: You may ask leading questions, but you may not use the remote approach.

MR. JOHNSON: Very well.

(Conference at bench concluded.)

BY MR. JOHNSON:

Q. Do not the traffic records of Jones, Arthur Jones, show that on December--

THE COURT: No, Mr. Johnson, you may not testify. You may ask a question, but you may not make an assumption in your question.

BY MR. JOHNSON:

Q. Did you examine the traffic record of Jones?

THE COURT: You may come back to the bench.

(Conference at bench:)

THE COURT: Do you want to elicit information that the car was in police custody on the night or the early morning of the 7th?

MR. JOHNSON: Yes.

THE COURT: Then ask the question, was the car in police custody, and do not say, "Does the record show it was", because that assumes something.

(Conference at bench concluded.)

BY MR. JOHNSON:

Q. Was this car, bearing tag number JK 8150, in police custody
154 on the morning of December the 7th? A. Truthfully, sir, I don't know whether it was or not.

THE COURT: What was your answer?

THE WITNESS: Truthfully, sir, I don't know whether it was in custody or not.

BY MR. JOHNSON:

Q. Did you look at the traffic record of Jones? A. No, sir.

Q. Did you find out his address? A. We had an address on Jones.

Q. Did you find out whether he had a permit in the District of Columbia or not? A. No, sir.

Q. Did you examine the traffic records to find out if he had one? A. No, sir.

Q. During the course of your conversation with Bynum, did he tell you where he was on December the 6th?

MR. FLANNERY: I object, your Honor. He has the date wrong. He said December the 6th, and it should be August the 6th.

MR. JOHNSON: I beg your pardon.

THE COURT: And that would be a self-serving declaration.

MR. FLANNERY: Exactly.

155 MR. JOHNSON: It wouldn't reveal -- I just asked him whether he did --

THE COURT: I will sustain the objection to that, because you are calling for a self-serving declaration.

BY MR. JOHNSON:

Q. Did you have a conversation, without revealing what it was, with Bynum about his activities on the night of August 6th? A. That was Detective --

THE COURT: Just a moment.

MR. FLANNERY: I have no objection to a yes or no answer but, of course, I would object to the content.

THE COURT: Answer yes or no.

THE WITNESS: No, sir.

BY MR. JOHNSON:

Q. You had no conversation with him? A. No, sir.

Q. Then you never asked Bynum whether he committed this offense?

THE COURT: I will not permit that because you are asking for a self-serving declaration.

Now, I have ruled on this, Mr. Johnson.

MR. JOHNSON: May he answer it either yes or no?

THE COURT: He has answered, no, and that ends the matter. You may not pursue it.

156 MR. JOHNSON: Very well, if your Honor please.

THE COURT: I am going to ask you to come to the bench.

(Conference at bench:)

THE COURT: You know, Mr. Johnson, I am saying this out of the hearing of the Jury: If the defendant wants to get some information before the jury that is relevant, he has a way of doing it at the proper time. You can not get it indirectly by having the officer testify as to what self-serving declarations the defendant made to the officer and make him immune from cross examination.

MR. JOHNSON: He has only testified to part of the conversation.

THE COURT: Well, he testified that that is all there was.

MR. JOHNSON: He didn't say that is all there was. The other one said it was all.

MR. FLANNERY: The Government didn't go into any of the conversation.

MR. JOHNSON: If your Honor please, over my objection you permitted him to relate it.

THE COURT: What did you say?

MR. JOHNSON: You remember I objected to his conversation, and you said, "Oh, no, he can answer."

THE COURT: The only conversation that Officer Noone testified to was that the defendant admitted he was the owner of the car, but this
157 officer did not testify to any conversation.

MR. JOHNSON: Yes, he testified that Bynum told him about the car being in custody, about giving it to Jones, about where he left it and all that.

THE COURT: You brought it all out.

MR. JOHNSON: I objected to it and your Honor said -- I asked, could he just answer yes or no and give whatever explanation --

THE COURT: No, he was giving you an answer that was responsive to your question.

MR. JOHNSON: But I did not ask him about any conversations.

THE COURT: You asked him, as I recall, how the defendant --

MR. JOHNSON: Came into custody.

THE COURT: -- and he was answering. Some people give more detailed answers than others. He was answering your question, and his answer was responsive.

Now, I am not going to permit you to bring out self-serving declarations.

MR. JOHNSON: Can he bring out the remainder of the conversation in which he was talking about what happened to Jones and the car?

THE COURT: Oh, no. You can bring it out in another way if you
158 want to; you know that, Mr. Johnson.

(Conference at bench concluded.)

BY MR. JOHNSON:

Q. Did you or did you not show a print, a fingerprint, to this defendant? A. No, sir.

Q. You did not? A. No, sir.

Q. Did you have a conversation with John Bynum in his presence?

THE COURT: With who?

MR. JOHNSON: With John Bynum in the defendant's presence.

THE COURT: Who is John Bynum?

MR. JOHNSON: He is a brother.

THE COURT: The brother is Kenneth, isn't he?

MR. JOHNSON: There are two brothers.

THE COURT: There are two. I haven't heard John mentioned before. Well, you are asking for conversation now had with a third party?

MR. JOHNSON: In the presence of the defendant.

THE COURT: The fact that it was in the presence of the defendant doesn't make it admissible. Is there an objection?

MR. FLANNERY: Oh, yes, your Honor.

159 THE COURT: Sustained. It is obviously incompetent. You know, if John Bynum has any information that is admissible, you can subpoena him; you can put him on the stand, but you can not bring in hearsay testimony as to what John Bynum told this officer.

MR. JOHNSON: In the presence of the defendant?

THE COURT: I know there are many members of the Bar who are laboring under the false impression that the hearsay rule doesn't apply if the defendant is present. There is no such principle of law.

MR. JOHNSON: No, your Honor, I was merely pursuing it on the theory this was a police investigation.

THE COURT: That doesn't make everything admissible. You know, if it were, then we could let everything in that was brought out in the police investigation, let it be introduced against the defendant even if it is not particularly competent. You can not have it both ways.

BY MR. JOHNSON:

Q. Is it your testimony, Officer, that you had Bynum arrested?

A. Yes, sir.

Q. On what grounds did you have him arrested?

THE COURT: I will exclude that; that is irrelevant.

MR. JOHNSON: All right, if your Honor please.

BY MR. JOHNSON:

160 Q. At the time of Bynum's arrest, did you have the fingerprint evidence that was presented here?

THE COURT: No, I am going to exclude that; that is immaterial. Now, I have already ruled that there was reasonable grounds for an arrest in the first place, and in the second place, whether the arrest was made on reasonable grounds or not is immaterial so far as the issues of this trial are concerned, so you may not pursue that line of inquiry.

MR. JOHNSON: All right.

BY MR. JOHNSON:

Q. Did you interview any other person, other than Bynum?

THE COURT: I think that is irrelevant.

MR. JOHNSON: After his arrest?

THE COURT: That is irrelevant. You know it is, Mr. Johnson.

MR. JOHNSON: Very well, if your Honor please. May I check my notes just a moment?

THE COURT: Surely. Take all the time you need.

BY MR. JOHNSON:

Q. Did there come a time, sir, when you found out there was a fingerprint involved in this case? A. Yes, sir.

Q. Did you --

THE COURT: Well, now, I am going to exclude that as irrelevant.

161 If you have any relevant question to ask, ask it directly without a remote approach.

MR. JOHNSON: Very well, your Honor.

BY MR. JOHNSON:

Q. Well, did you compare that fingerprint through the usual channels?

THE COURT: I will exclude that. We had a fingerprint expert testify who did the comparing.

MR. JOHNSON: That was afterward, if your Honor please.

THE COURT: I am going to exclude that as irrelevant.

BY MR. JOHNSON:

Q. Have you ever found Jones? A. No, sir; he is still out.

Q. Do you know whether or not he is involved in this case? A. Yes, sir.

Q. He is? A. We understand so, sir.

THE COURT: There are two men involved in this case?

THE WITNESS: Yes. There is a lookout for the man he is talking about. There is also a Commissioner's warrant, issued by the United States Commissioner, for Arthur Jones' arrest, your Honor.

162 THE COURT: Is it on the theory he might be the other man involved in this robbery?

THE WITNESS: Yes.

BY MR. JOHNSON:

Q. Now, with regard to Jones, have you received any information from any one as to his whereabouts?

THE COURT: No, I will exclude that. You know it is not permissible, Mr. Johnson, to ask that. You are too good a lawyer not to know that.

MR. JOHNSON: I asked the question directly.

THE COURT: Well, that has nothing to do with this case. I presume if they could find Jones, having a warrant out for his arrest, they would bring him in. But we are not trying Jones in absentia.

MR. JOHNSON: Your Honor, to my point of view, we are.

THE COURT: No, because there are two men involved in this robbery, and the question that we are trying is the charge that this defendant was one of the two men involved in the robbery. Who the other one was is not the question at this time in this trial.

MR. JOHNSON: Well, I am trying to find out who the other two are, if your Honor please.

THE COURT: Well, you are going outside of the rules of evidence.

163 MR. JOHNSON: May I explore what they did to find out who the identity of the people were, if your Honor please?

THE COURT: You may ask questions that are admissible under the rules of evidence, and you are charged with knowledge of the rules of evidence, and I know that you know the rules of evidence.

MR. JOHNSON: Yes, sir.

THE COURT: Because you have tried many cases. Will counsel come to the bench?

* * * * *

164 BY MR. JOHNSON:

Q. Now, did you make any tests upon the defendant? A. Did I --

THE COURT: Any tests for what?

MR. JOHNSON: Any tests.

165 THE COURT: What kind of tests?

MR. JOHNSON: Lie detector tests.

MR. FLANNERY: Oh, I object to that, your Honor.

THE COURT: Objection sustained.

MR. JOHNSON: If your Honor please, may I make an application at this time? I would like to have one made on my client at the D. C. Jail.

THE COURT: You would like what?

MR. JOHNSON: Permission to make one on my client at the D. C. Jail.

THE COURT: A lie detector test?

MR. JOHNSON: I would like to have a lie detector test made on my client at the D. C. Jail.

THE COURT: Now, you know that is just a spectacular move because the results of lie detector tests are not admissible in evidence. You should not have made that statement in the presence of the Jury.

MR. JOHNSON: If your Honor please, the only reason -- may I come to the bench?

THE COURT: No. Do not make things worse. You had better come to the bench.

(Conference at bench:)

THE COURT: Mr. Johnson, I consider it reprehensible for you to have made that statement in open Court.

MR. JOHNSON: I will tell you why I made it. Before this, I had a
166 case with the same detective, and we did make a lie detector test.

THE COURT: You know perfectly well you had no right to make the statement in the presence of the Jury. If that statement was made in good faith, you should have asked leave to approach the bench and make the request at the bench.

MR. JOHNSON: Well, I am sorry, your Honor; I did not mean--

THE COURT: You do that sort of thing too often. You know, if you were trying your first or second case, I would excuse it, but --

MR. JOHNSON: May I have permission to make one tonight?

THE COURT: To what?

MR. JOHNSON: May I have permission to make a lie detector test tonight?

THE COURT: If you want to hire a lie detector instrument from some one, or buy one, you can go ahead and make your own test.

MR. JOHNSON: I am willing to pay for it out of my own pocket.

THE COURT: Well, I am not going to request the Government to make a lie detector test, because the results of a lie detector test are not admissible in evidence.

MR. JOHNSON: If your Honor please, it may not be, and I don't
167 think he would have any objection to it if I waived it.

MR. FLANNERY: I would have objection to it. The best lie detector is the jury, in my view.

THE COURT: And it comes pretty late in the day.

MR. JOHNSON: Well, I tried yesterday, if your Honor please, and --

THE COURT: No. This indictment was returned on the 7th of October.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA

United States Court of Appeals for the District of Columbia Circuit

FILED DEC 30 1958

Joseph W. Stewart CLERK

No. 14403

CLAYBORNE BYNUM, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

PETITION FOR REHEARING EN BANC

Comes now the appellee, by its attorney, the United States Attorney, and moves the Court to grant rehearing in banc. The instant case is plainly one that is appropriate for such consideration.[1]

1. The decision in this case is in direct conflict with two recent decisions of this Court. The opinion, however, makes no mention of either of these precedents, and is based on a legal premise flatly contradicted by both of them.

In *Smith* v. *United States,* — U. S. App. D. C. —, 254 F. 2d 571, *cert. denied,* 357 U. S. 937 (1958), the Court held that an oral confession made by appellant following his arrest was admissible even if the arrest was illegal.

> We believe the rule to be that confessions made while a defendant is under arrest are admissible in evidence if voluntarily made and if Rule 5, Federal Rules of Criminal Procedure, is not violated, *whether the arrest was legal or illegal.* (Emphasis added.)

* * * * *

[1] The Court is authorized by statute to order rehearing in banc. 28 U. S. C. § 46 (c) (1952). It is a "necessary and useful power" in cases "appropriate for consideration by the full court". *Western Pacific R. Corp.* v. *Western Pac. R. Co.,* 345 U. S. 247, 259, 260, 262.

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> We believe that neither the arrest nor subsequent search was illegal; but, without the necessity of holding that the arrest and search were proper, we believe that the admission of the inculpatory statement was proper, and that no reason exists for the reversal of the conviction on this account.

In *Gibson* v. *United States,* 80 U. S. App. D. C. 81, 149 F. 2d 381 (1945), reaffirmed in the *Smith* case, the Court refused to reverse appellant O'Kelley's conviction despite the fact that all of the Government's evidence derived from admissions made by appellant while under illegal arrest.

In the instant case the Court holds that it was reversible error for the trial judge to admit evidence of fingerprints taken from the accused following an assumedly illegal arrest but during a period of necessary delay between arrest and arraignment. Rule 5 (a) was not held to be violated. Plainly, the rule applied in *Gibson* and adhered to in *Smith,* was disregarded.

In support of its conclusion the Court cites *Upshaw* v. *United States,* 335 U. S. 410 (1948), and *Mallory* v. *United States,* 354 U. S. 449 (1957). But in each of those cases confessions were held inadmissible because of unnecessary delay between arrest (whether legal or illegal) and arraignment. The policy underlying those decisions—to make certain that any confession introduced into evidence is untainted by prolonged detention in the hands of the police—is not applicable to this case because the fingerprints, by the Court's own statement, were obtained "almost immediately after arrest". An incriminating statement obtained shortly after arrest is admissible, since made before the policy against undue delay in arraignment is violated. *United States* v. *Mitchell,* 322 U. S. 65 (1944). *Upshaw* and *Mallory,* therefore, were erroneously deemed to be controlling in this case. Those decisions were not concerned with the problem of the consequences of an illegal arrest.

2. The only other authority cited by the Court was the doctrine that requires suppression of articles seized from the person of the accused upon the occasion of an illegal arrest.

Its opinion creates an unwarranted and unprecedented extension of that doctrine.

In this case nothing was seized from appellant. The fingerprints obtained were not evidence of any crime, but were only the means by which evidence of appellant's involvement in the crime was given probative value. We find no basis in the language of the Fourth Amendment, itself, or in the cases which have construed it, for the suppression of such fingerprints.[2] A fingerprint taken while a person is in police custody, like a photograph, is but a scientific method of establishing who the person is; supplementing the name, address and other information pertaining to identity that were already in the hands of the police.

The Court's extension of the rule of *United States* v. *Di Re*, 332 U. S. 581 (1948), upsets the carefully evolved compromise between society's interest in bringing the criminal to justice and in proscribing illegal police activity. The new rule takes a substantial step in the direction of immunizing from prosecution those whose arrests are illegal and undermines the well settled rule that illegal arrests, standing alone, are of no significance.

3. In any event, there was probable cause for the arrest of appellant. After being informed of an unusually brutal robbery, the police had good reason to believe that a certain automobile was used in the commission of the crime. After investigation they learned that the owner of the car was a person of undetermined address [3] and that he was living in the District of Columbia but was, in violation of the law, driving an automobile with Maryland license plates. Under those circumstances and with a full awareness that it might be well nigh impossible to find appellant because of his suspicious conduct in moving from place to place so often, the police had probable cause to believe that appellant had committed or aided in the commission of the crime. Probable cause for appellant's arrest, made when he appeared at the police sta-

[2] Nor does the Fifth Amendment prohibit the taking of a fingerprint. *United States* v. *Kelly*, 55 F. 2d 67.

[3] They investigated three addresses where he was supposed to have resided (one of which was not even a residence and was the address listed as appellant's home on his owner's permit) and could not locate him.

tion, is found in the composite knowledge of the police force. The opinion in this case erroneously isolates the facts known to the particular police officer who happened to execute the arrest. Cf. *Weise* and *French* v. *United States*, 251 F. 2d 867 (9th Cir. 1958). In any event, the police officer who arrested appellant was aware that appellant was illegally using an automobile in the District of Columbia and was therefore subject to arrest on that basis.

CONCLUSION

Wherefore, it is respectfully suggested that the Court's discretion would most appropriately be exercised by an order of a rehearing en banc.

(s) Oliver Gasch,
OLIVER GASCH,
United States Attorney.

(s) Carl W. Belcher,
CARL W. BELCHER,
Assistant United States Attorney.

(s) Nathan J. Paulson,
NATHAN J. PAULSON,
Assistant United States Attorney.

CERTIFICATE OF GOOD FAITH

It is hereby certified that the petition is presented in good faith and not for delay.

(s) Nathan J. Paulson,
NATHAN J. PAULSON,
Assistant United States Attorney.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition for Rehearing En Banc has been mailed to attorney for appellant, Henry Lincoln Johnson, Jr., Esquire, 626 3d Street NW., Washington, D. C., this 30th day of December 1958.

(s) Nathan J. Paulson,
NATHAN J. PAULSON,
Assistant United States Attorney.

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MR. JOHNSON: I agree, if your Honor please, but the difficulty is, I have had difficulty getting handwriting experts, had difficulty getting things to work with. I have paid money out for that personally. I tried to get a man from the police department to do it. I couldn't get one.

THE COURT: I repeat, it was reprehensible to make the statement in open Court. Proceed. Is there anything further?

MR. JOHNSON: Can I have permission to have it tonight, regardless of whether it is admissible, and pass on the admissibility later?

THE COURT: I do not give permission of that kind. That is the most astounding request. You may proceed, gentlemen.

(Conference at bench concluded.)

BY MR. JOHNSON:

168 Q. Did you search the defendant? A. No, sir.

Q. Did you examine the property that he had? A. No, sir.

Q. Do you know what property that he did have? A. No, sir.

Q. Did you find the registration card for the car? A. I didn't look for one, sir.

THE COURT: In whose name was the car registe red?

THE WITNESS: It is listed to Clayborne Bynum, your Honor.

BY MR. JOHNSON:

Q. Now, did you find any of the effects of Mr. Good on the person of Mr. Bynum? A. On the person of Mr. Bynum?

Q. Yes. A. No, sir.

Q. Did you search his house? A. No, sir.

THE COURT: Will counsel come to the bench?

(Conference at bench:)

THE COURT: Now, this is intolerable. You know perfectly well that there are ways in which the defendant can prove what he had at the time of his arrest, and you may not use this indirect method.

MR. JOHNSON: The defendant couldn't possibly do anything. He

169 has been in custody. He could not tell me anything.

THE COURT: Well, there are other ways to do that. You know what I mean.

MR. JOHNSON: Yes, sir.

THE COURT: I am saying this out of the presence of the Jury, but what are you trying to prove?

MR. JOHNSON: That there is absolutely no connection with this man except --

THE COURT: What are you trying to elicit from this witness?

MR. JOHNSON: That every single circumstance that he found out by Bynum, from his interview with him, his examination of him and his person pointed to Bynum's innocence.

THE COURT: Is Bynum going to take the stand?

MR. JOHNSON: Yes.

THE COURT: If he is, then you are wasting time with this. Let him testify himself.

MR. JOHNSON: All right. May I recall him after the defendant testifies?

THE COURT: Well, we will see. I am not making advance rulings.

(Conference at bench was concluded.)

MR. JOHNSON: That is all, if the Court please.

MR. FLANNERY: No questions.

170 THE COURT: We will suspend at this time until tomorrow morning, and I think, Mr. Johnson, you must make more expeditious progress.

Ladies and gentlemen of the Jury, we will recess at this time until tomorrow morning at 10:00 o'clock. You may be excused at this time, and please be back in your seats in the Jury box a few minutes before 10:00 o'clock tomorrow morning.

(Whereupon, at 3:45 o'clock p.m., the above-entitled matter was recessed, to reconvene at 10:00 o'clock the following morning.)

* * * * *

171 MR. JOHNSON: May we approach the bench?

THE COURT: Yes, indeed.

(At the bench:)

MR. JOHNSON: Your Honor, in response to your Honor's suggestion yesterday, I contacted the Police Department officer and apprised him of

what transpired and I also called the assistant principal of the school, a lady by the name of Dunn. The principal did not make it and she indicated to me she thought the child's mother should accompany her. This,
172 as I indicated Your Honor, has been reported to me. I talked to the child's mother and I apprised her of what happened. I also sent Mrs. Charles Bynum, who is the 17 year old daughter herself, and suggested to Mrs. Martin that the child could come with this older lady and she told me she wouldn't let her come in here; she wouldn't permit her to be served. I will have to ask you in order to get this testimony, to have the US Marshal--

THE COURT: What testimony do you expect to elicit?

MR. JOHNSON: This young lady at about 8:30 or a quarter till 9, on the evening of 6 August, this young lady accompanied Clayborne Bynum to a roller skating rink with another young lady. They were driven there by John Bynum, another brother of the man's because Clayborne Bynum's car was being used by Jones. They stayed at the rink until after ten thirty or a quarter till 11:00.

THE COURT: I suppose, of course, your theory is she is a necessary witness?

MR. FLANNERY: I wonder if counsel has talked to the witness?

MR. JOHNSON: Oh, yes, certainly.

THE COURT: I think I will then issue a forthwith subpoena.

MR. JOHNSON: All right, sir, I will have it prepared and in the meantime -- her name is Loretta Martin.

(Following bench conference:)

173 THE COURT: Will counsel come back to the bench?

(At the bench:):

THE COURT: How old is this young woman?

MR. JOHNSON: Seventeen years.

THE COURT: Are you sure she is as old as that?

MR. JOHNSON: That is what I have been informed; I don't know that.

THE COURT: Now what school is this?

MR. JOHNSON: Springuam.

THE COURT: High school?

MR. JOHNSON: High school.

THE COURT: How old is the defendant?

MR. JOHNSON: Twenty.

THE COURT: What would he be doing out with a 16 year old girl. Are you sure you want to put her on the stand?

MR. JOHNSON: I don't imagine there is any harm in going to a roller skating rink with the young lady.

THE COURT: It is not a question of whether or not there is harm to roller skate. On the contrary it is a very good exercise.

MR. JOHNSON: That is right.

THE COURT: But with a twenty year old young man who is probably sophisticated in the ways of the world.

MR. JOHNSON: He was 19.

THE COURT: He was 19 taking a 16 year old out.

174 MR. JOHNSON: They went with another girl. Also, there wasn't a single solo engagement.

THE COURT: There is a colloquial expression that covers the situation, robbing the cradle.

MR. JOHNSON: Well --

THE COURT: However, I think that equally applies to the Police Department too.

MR. JOHNSON: I think that is the reason why the police were perturbed yesterday. I am referring to a telephone call. We could have avoided all of this if the police had been permitted to testify as to the investigation; it wouldn't have been necessary.

THE COURT: Now what makes you say that?

MR. JOHNSON: I am positive that Mr. Antonelli, he is a very thorough officer from my experience I have had with him, and I think he made a thorough investigation of this boy's statement as to the roller skating rink, whether he was there and whether he went in the company of another girl or not and all of that.

THE COURT: Yes, but what testimony could you have elicited?

MR. JOHNSON: That he verify the story.

THE COURT: Well if he verified the story the defendant would not be here.

MR. JOHNSON: I doubt that, your Honor. He didn't have the power to release him.

175 THE COURT: If he had not verified the story the case would not have been presented to the grand jury.

MR. JOHNSON: I think --

THE COURT: I think, to use a colloquial expression, you are whistling in the dark, --

MR. JOHNSON: Oh, no, I am positive I am right.

THE COURT: As far as the officer's statement is concerned you can rest assured if the officer had verified the story the defendant's case would never have been presented to the grand jury.

MR. JOHNSON: I was presumptuous, supposing he had not done so.

THE COURT: I have no doubt but that he investigated it and I have no doubt that he did not verify it.

MR. JOHNSON: I would be willing to risk it.

THE COURT: If he had verified it they would have released the man.

MR. JOHNSON: I have no misgivings that his story is true, I have made a thorough investigation of it.

THE COURT: Of course, the defendant does not have to explain under our system of law. Sometimes it is advantageous to have him explain.

MR. JOHNSON: I am going to have him to do so.

THE COURT: The question is here how did the fingerprints--

MR. JOHNSON: You couldn't tell the print, where it came from.

176 Now when it is lifted you can't tell where it came from.

THE COURT: Do you dispute the fact this print was taken from the mirror of the car or do you dispute that it corresponds --

MR. JOHNSON: I wouldn't dispute the fact that it corresponds but I dispute the fact it came off that rear vision mirror.

THE COURT: On what basis? Also, I do not want to repeat what I have often said, but I do not want to see an innocent man convicted.

MR. JOHNSON: I know you don't.

THE COURT: And if I had any doubt that this defendant was not the right man, I would communicate that doubt to the jury.

MR. JOHNSON: May I do this, if your Honor please, I have been unable to the present time, namely, to see through the right rules of evidence. I have no criticisms of the rulings, the way they have gone but the tendencies or posture of this case I haven't been able to develop mainly because most of the stuff my client doesn't know. For instance on the morning of December 7, two men were in Clayborne Bynum's car.

THE COURT: Do not let us get off on a tangent. What makes you question the fact this finger print was lifted from the rear vision mirror of the car?

177 MR. JOHNSON: Because Clayborne Bynum was never in that car.

THE COURT: The finger print proves the contrary.

MR. JOHNSON: I agree with Your Honor, the difficulty is if Bynum either died on the fourth and the finger print were produced, of course, Your Honor would say --

THE COURT: Oh, then it would have been -

MR. JOHNSON: I know if it were, it would still be a analogous situation, you couldn't explain it.

THE COURT: That is why I believe in circumstantial evidence. I put no stock in evidence of eye witnesses. If a man comes along and says there is a man who held me up two or three months ago I do not feel it is as convincing as circumstantial evidence. Circumstantial evidence is much stronger than actual direct evidence.

MR. JOHNSON: The only thing that made me suspicious of this is that I talked to Mr. Shelder, who set up the finger print department at the Federal Bureau of Investigation and with Doctor Scalley of the Bureau of Standards and the primary rule of the Federal Bureau of Investigation is to never lift a print for the very reason I am speaking to you about. When you put your fingers onto it, lift it, it is destroyed.

This finger print expert was trained at the finger print department of the Federal Bureau of Investigation.

MR. FLANNERY: Why do you not call the gentleman you talked to as a witness?

178 THE COURT: That is recognized procedure.

MR. JOHNSON: But the FBI forbids it.

THE COURT: Oh, I do not think so.

MR. JOHNSON: If I produced the gentleman I want to restrict his testimony as to whether the Federal Bureau of Investigation, he was in charge of the finger print section, whether they do not have a rule, whether he didn't teach either of the men who were there, never to lift a finger print.

THE COURT: I will not admit testimony as to the practice of the Federal Bureau of Investigation or any other agency. Of course, you have the right to offer evidence that is not the usual procedure in finger print investigations.

MR. JOHNSON: Your Honor, you pointed your finger at a very sore point with me. When I got that information I was wondering why they didn't charge this fellow with kidnapping, being unknown, but once they charged him with that, then that is a FBI case.

THE COURT: I do not know why and you would not be correct in assuming that. If it is an FBI case, all you have to prove is that there has been an interstate transportation.

* * * *

180 (Following bench conference:)

THE COURT: You may proceed, Mr. Johnson.

MR. JOHNSON: I have no further cross-examination.

* * * *

CLAYBORNE BYNUM

took the stand in his own behalf and, having been first duly sworn, was examined and testified as follows:

MR. JOHNSON: Now Clayborne, I want you to look at me, talk to me so that everyone in the courtroom can hear you clearly every word

that you say. Do you understand?

181 DIRECT EXAMINATION

BY MR. JOHNSON:

Q. Tell me whether you understand? A. Yes, yes, I understand.

MR. JOHNSON: Speak a little louder than that.

Q. Now, state your name? A. Clayborne Bynum.

Q. And you are how old, Clayborne? A. 21.

Q. When is your birthday? A. April 26, 1924, April 24, 1936.

Q. Now, do you own an automobile? A. Yes, I do.

Q. What is the license number of that automobile, if you know? A. Jk 8150.

Q. In August and prior thereto in 1957 were you employed? A. Yes, sir.

Q. Where? A. At Talbott's Ice Service and Discount Tourist Home, a guest house.

Q. Two jobs? A. Yes, sir.

Q. Now then what was your job prior to that? A. I was working subsequently with a radio and television technician.

182 Q. On August 6 or prior thereto did you know a man by the name of Jones? A. I did, yes.

Q. What was his name? A. Arthur Jones.

Q. Did you prior to or on August 6 have anything to do with him about your automobile? A. I loaned it to him several times.

Q. Now then did he have your automobile on August 6? A. From about around 6:30 in the evening.

Q. Now where did you live at that time? A. I was living at 413 50th Street, N. E.

Q. What time, if at any time, at about 6:00 or 6:30 did you see Arthur Jones? A. What time?

Q. Yes. A. Around 6:30, between 6:30 and7:00 o'clock.

Q. Now tell his Honor and the ladies and gentlemen of the jury exactly what happened from 6:30 when you saw Jones up - right straight along up until 9:00 o'clock. A. Well the jury and Your Honor, he came

to my house with my sister-in-law's sister and he sent her up and ask and told her to tell me he wanted to speak to me and I came down and he asked me could he borrow my car, he wanted to take his uncle, and some friend somewhere. I told him he could use my car because I wasn't going anywhere that night and to bring it back. He took my car and kept it until Thursday morning.

183 Q. After you agreed to loan your car did you go anywhere? A. Before he left?

Q. To go downstairs with him and get in the car? A. No, I did not.

Q. What happened with regard to the car? A. I gave him the keys and he got in the car and she got in with him, that is my sister-in-law's sister, and drove off.

Q. What did you do then? A. I went back upstairs and I stayed there and looked at television until about 7:30 and then I came downstairs so I stayed down there until about.

Q. In your stay downstairs, tell me what did you do first? Did you go any place with anybody? A. Later on that night.

Q. Do you know a man named McNabb? A. Yes.

Q. Did you go anywhere with him? A. We went down on the street and played pool.

Q. What place? A. It is right between 50th and Grant, a woman owns it.

Q. Did there come a time when you left there? A. I left there.

Q. Never mind the time and place. Did you leave there first? A. Yes, sir.

184 Q. After you left where did you go? A. I went straight home.

Q. And what did you do when you got home? A. Well my sister-in-law answered the door and she told me my brothers had just left, he had taken my twin-brother to work and that was about a quarter till, I think, it was about a quarter till twelve, something like that.

Q. A quarter till twelve that night? A. I think so.

Q. Did you go roller skating that night? A. No, sir.

Q. Do you know a Loretta Miller? A. Loretta Martin.

Q. Do you know her? A. Yes, sir.

Q. Did you go anywhere with her? A. I went with her the next night.

Q. It wasn't the night of the 6th? A. No, sir.

MR. JOHNSON: May we come to the bench?

THE COURT: Yes.

(At the bench:)

THE COURT: Should we hold back the forthwith subpoena?

MR. JOHNSON: Yes, that is right.

(Following bench conference):

185 BY MR. JOHNSON:

Q. Now with regard to when you came back. Did you look at any particular program on television? A. I looked at the late show, part of it was already on.

Q. Who was present? Did you go anywhere with Jones that night? A. No, no.

Q. You did not? Now when was the next time you saw your automobile? A. Thursday about one o'clock.

Q. About one o'clock? A. Yes, yes, sir.

Q. How did you come to see your automobile then? A. I had been searching for my automobile before hand; days before that and I couldn't find it so I went over to my older brother's house after going out to Sears Roebuck where I was supposed to start working, changing jobs, to work out there as a janitor, and after I left out there, I came to his house and he told me Arthur Jones had called me and said the police were looking for my car and to hold me there until he called and I stayed there and my brother asked me what were they looking at my car for and I told him we were down to the beach about a week or two before that on a Sunday.

Q. Never mind about that. Anyway you told him what was in your mind, why the police were looking for your car, you thought? A. Yes, sir.

186 Q. Had you talked to Jones at that time? A. Not before. We saw him later on.

Q. Did you come to see him that day at all? A. Yes.

Q. What time? A. It was around 11:30.

Q. That morning? A. 11:30, yes.

Q. How did you contact him? A. I called him back and so I talked to him on the telephone so he told me to meet him on 6th Street, over at my sister-in-law's sister's house.

THE COURT: That was the following day, Thursday?

MR. JOHNSON: It was on a Thursday, that was two days after he had gone to work.

BY MR. JOHNSON:

Q. Now on this Thursday, he told you to meet him on 6th Street? A. On 6th Street.

Q. Northwest or Northeast? A. Northeast.

Q. Sixth and what? A. I think it was 915 or something like that; I have forgotten now.

Q. Was it a house number? A. Yes, sir.

187 Q. Did you go there? A. Yes, sir.

Q. Was he at this house? A. No, he wasn't there then.

Q. What happened when you got there? A. We waited around, my oldest brother and I.

THE COURT: Are you not going a little far afield? Now you are going into what happened two days later after the robbery.

MR. JOHNSON: If your Honor please, I think there is some connection, something I want to show about what happened on Thursday.

THE COURT: Do not bring in hearsay.

BY MR. JOHNSON:

Q. Now without regard to what people said to you, as a result of this conversation with Jones, did you see your car that day? A. I did.

Q. What did he tell you about your car?

THE COURT: Well now are you not getting into the hearsay field. He admission of Jones' statement is damaging.

MR. JOHNSON: He is allegedly a co-defendant.

THE COURT: He is not at all in this case.

MR. JOHNSON: I thought he was indicted along with this defendant.

188 THE COURT: He is not indicted in this case; he is not on trial here and he is not here to speak for himself. Of course, now if the Government consents to this going in, I will not exclude it but it is certainly hearsay and I doubt its relevancy.

MR. FLANNERY: I object to it, your Honor.

THE COURT: Objection sustained. My ruling is limited only to statements alleged to have been made by Jones to the witness.

BY MR. JOHNSON:

Q. Now at that time when you saw Jones, what, if anything, did he give you? A. He gave me the keys to my car and he told me.

MR. JOHNSON: Not what he told you. His Honor has ruled you cannot tell us what he told you. Don't relate what you told him or he told you.

BY MR. JOHNSON:

Q. He gave you the keys to the car? A. Yes, sir.

Q. What, if anything, did you do about that? A. Well, he told me.

MR. JOHNSON: No, not what he told you.

THE COURT: Tell us what you did after you got the keys.

WITNESS: I went with him over to a place they call Park Land with my brother, my older brother.

BY MR. JOHNSON:

189 Q. And did you do anything at Park Land? A. I found our car parked behind some, not empty houses, but apartment houses in a lot.

Q. What, if anything, did you do then? A. I went and tried to start it up. And he said -

MR. JOHNSON: No, not what he said because Your Honor-

MR. FLANNERY: In the interest of giving this man the opportunity to say what he believes is true, I want to withdraw that objection and let the jury hear it.

THE COURT: Very well, he may tell his story.

BY MR. JOHNSON:

Q. Now let us go back to the time you first met Jones. What did you say to him? A. I asked where he had been with my car and why he had kept it all that time.

Q. What, if anything, did he say to you? A. He told me the police were looking for it.

Q. That is all right now. You can go ahead and tell it. A. Because of what he had did, done in Maryland. You see he had gotten in a fight with some boys and they took the tag number of my car and I had my other brother's car, John Bynum, and I was using his car so the boys took his tag number and the cops, I mean the police, apprehended him so then he was supposed to go back to court that Wednesday and he didn't appear so they were supposed to be looking for him for jumping bond. He posted a bond that Sunday night.

190 Q. Is that why he told you the police were looking for your car? A. That is why he told me they were looking for my car.

Q. What? A. That is what he told me.

Q. Did you start your car? A. He told me the transmission wouldn't work and it wouldn't start. After we got there and I started my car up and the transmission worked all right so me and my brother, oldest brother and I talked and we said that is kinda fishy and I asked him what was, was that the real reason why he kept that car over there and he said yes.

Q. What did you do then with your car, if anything? A. At that time I drove it back home then I had to go back up to some girl's house because they were having a party at their apartment.

Q. Now with regard to Mr. Good, did you see Mr. Good in the audience out here? A. Yes, sir.

Q. You have seen him in a lineup, haven't you? A. Yes, sir.

Q. Had you ever seen that man before a lineup? A. No, sir.

Q. Have you ever robbed that man? A. I have never been near that man other than he came down to the precinct.

191 Q. With regard to your arrest when was the first time you found out that your car was in police custody? And how did you come to find that out? A. Well it was on Friday, the following day, after I had gotten my car that around, I came home from out at Sears Roebuck again because I had to go back out there and I had taken a physical examination so I had to go back out to Sears Roebuck and get some papers straightened out and I got back home, I guess around 2:00 o'clock and my twin brother wanted to borrow my car. He said he wanted to go down in Southeast and I had a suit down at the cleaners so I told him when down at Southeast, to pick up my suit at the cleaners so then I guess it was around about 2:30 o'clock I got a call and he told me the police had him, said they were holding him for suspicion of a robbery, said they were investigating him and my car, and he said they said they were going to take him down to precinct number 1 and he would be home in about thirty minutes.

Q. Where was he calling from? A. He said he was calling from number 14 precinct.

Q. Did there come a time after that that you talked to any policemen? A. I talked to Mr. Ford, I think it was.

Q. What, if anything, did Mr. Ford tell you? A. He told me I and my brother were wanted for robbery and he started asking me questions, he said sit down.

192 Q. How long before you got to the precinct after your brother talked to you on the telephone? A. Oh, twenty minutes. Later I called back and asked them was my brother still down at the precinct and they said, yes, so I asked them what were they holding him for and the said come and find out so I told them he told me about that robbery so they said come on down and we will talk to you too so I went down there.

Q. When you got down there did you tell the police exactly what you are telling the ladies and gentlemen of the jury? A. I told them exactly what I am telling you.

Q. Did you tell them any stories about that? A. I told no stories, I told them just what I said; I was playing pool and I had called some girls before hand because when --

Q. Did you give them the names of the girls? A. Mary Anthony and Loretta Martin.

Q. You called them when? A. That was when I was downstairs from my apartment, down in the basement under us.

Q. In other words, you told the police -

THE COURT: Please do not summarize.

Q. Were those your answers to questions as to what you were doing on December 6? I mean on August 6? A. Yes, sir.

193 Q. You told them what your activities were all during that evening? A. Yes,sir.

Q. Did you tell them Jones' name? A. I told them Jones name.

Q. Did you tell them if some question came up about whether your car had been in police custody while Jones was driving it? A. Yes.

Q. Now would you tell His Honor and the ladies and gentlemen of the jury what it was that you found out about your car being in police custody? A. Well, I just told them that same day they had stopped him and that is how I found out they were looking for that car, they had stopped him down on Nicholas Avenue somewhere and he had failed to exhibit my registration card.

Q. Did he pay a collateral? Did he put up collateral for failing to exhibit your registration? Did he tell you that?

THE COURT: Now I think you are going a little far afield. You have already asked this witness what he found out twice or three times.

MR. FLANNERY: In addition to that, Your Honor, he has been consistently leading the witness but I have not objected because I want him to have every opportunity -

THE COURT: I understand that. After all I appreciate the Government's attitude of not wanting to be in a position of objecting all the time.

194 We have waived a great many rules as to hearsay in order to let this defendant tell his story but there must be a limit.

MR. JOHNSON: Yes, your Honor, I will try to restrain him.

BY MR. JOHNSON:

Q. Now with regard to this car, you say Jones had indicated to you,

so as to bring you up to date so you won't have to rebut anything Jones said, he did indicate to you something about a failure to exhibit a permit? Will you tell His Honor and the ladies and gentlemen of the jury, when it was, what date, as near as you can tell that this offense of failing to exhibit your registration card occurred? A. It was the early morning after I had loaned him my car that Tuesday night. He said it was around two o'clock in the morning, something like that in the morning, on Wednesday morning.

Q. I see. Now in verification of what Jones told you while you were in police custody did you hear any conversation by a police officer? A. Yes, sir.

THE COURT: No, I am not going to allow that. I am not going to allow this witness to put words in somebody else's mouth; that is the reason the law has the hearsay rule.

195 MR. FLANNERY: Yes, I believe we should call a halt at this point.

MR. JOHNSON: If Your Honor, please, I don't want him to repeat the conversation.

THE COURT: No, I will exclude that.

MR. JOHNSON: If your Honor please, may I withdraw that and give you the substance at the bench?

THE COURT: Yes, you may but you may do so at the bench.

(At the bench:)

MR. JOHNSON: I want to tender the testimony; I am not certain of the identity of the officer but while Bynum was being questioned, a police officer said: "Doggone it, we had him in our hands and we let him slip through our hands."

THE COURT: That is obviously not admissible. May I ask you this?

MR. JOHNSON: Yes,sir.

THE COURT: Does that remark refer to Jones?

MR. JOHNSON: Yes, sir.

THE COURT: Well Jones is probably the second man in the case, that is the reason there were two robbers and not one.

MR. JOHNSON: The difficulty is he didn't have the registration card.

(Following bench conference:)

196 BY MR. JOHNSON:

Q. When you were arrested when you came to the 14th precinct, did you or did you not have your registration card? A. Yes, sir, I did.

Q. Where is it now? A. I don't know.

Q. Did the police take it away from you? A. They took everything I had.

Q. And had you given that registration card to Jones? A. No, sir, I had it in my possession all the time. I forgot to give it to him and my brother because it was in my wallet.

Q. Now, during the course of your conversation with the police officer, did you have any conversation with any police officer about this particular fact, not what some police officer said other than to you, but during his questioning of you, did anyone of the police officers say anything to you about this Jones' affair and the failure to exhibit your registration card?

MR. FLANNERY: I object to that Your Honor, that calls for hearsay.

THE COURT: Objection sustained.

BY MR. JOHNSON:

Q. Now when you were at number 14 precinct, you said you got there about what time, sir? A. Around, I guess it was about 3:00 o'clock in the afternoon.

197 Q. And what time were you taken down to police headquarters? A. Around, I got there I think it was -

THE COURT: I do not think that is relevant at all. It might be under certain-

MR. JOHNSON: Your Honor, please, I think it is relevant for one other purpose.

THE COURT: For one other purpose?

MR. JOHNSON: The question we have been discussing at the bench this morning.

THE COURT: I do not think it is relevant on that issue.

MR. JOHNSON: Sir?

THE COURT: I do not think it is relevant on that issue.

BY MR. JOHNSON:

Q. You got to police headquarters some time later that evening? A. Yes, sir.

Q. Were you questioned at police headquarters? A. Yes, sir.

Q. Was the same police questioning you?

THE COURT: Will counsel come to the bench?

(At the bench:)

THE COURT: It is not admissible in evidence for a defendant to show that the story he is telling on the witness stand is the same story he
198 originally told the police. In other words, a witness cannot lift himself up by his own boot straps, as the old English expression is. However, there is a certain contingency under which that is permissible. If, on cross-examination, the witness' testimony is impeached as to succession of time, then on redirect, in order to rehabilitate the witness, it is proper to bring out the fact the story he told on the witness stand is the same story he told on previous examination.

MR. JOHNSON: I am only bringing this up principally for the reason, Your Honor, things I am bringing out to show there was another conversation about the finger prints.

THE COURT: You may ask him about that, whether there was such a conversation concerning such and such, and if the answer is yes, then you may ask him what was said and that would not be subject to objection.

(Following bench conference:)

BY MR. JOHNSON:

Q. During this conversation at police headquarters, did there come a time when there was a conversation about a finger print? A. Yes, sir.

Q. Do you remember the officer's name? A. It was Antonelli.

THE COURT: What was his name?

THE WITNESS: I think it was Antonelli or something like that.

199 BY MR. JOHNSON:

Q. And during this conversation what, if anything, was said about a finger print? A. Around ten thirty or eleven o'clock, he told me that they had a finger print that belonged to me, that was after they had brought my car down there and everything and they had questioned us and finger printed us.

Q. Was there a finger print on the inside of your car? A. There was a circle print on there and it appeared, looked like that on the paper. They took me downstairs and showed me some prints there around about ten or eleven o'clock and said, these are your prints, they came off of another man's car.

THE COURT: No, just a moment, you have answered the question.

BY MR. JOHNSON:

Q. Will you tell the Court and jury what the print looked like? A. They were some black prints and they let me compare them with some black prints and they didn't look alike, and I told my brother, my older brother, after he got up there, and looked at them too, and he agreed with me, they didn't look like the same prints.

Q. Now during the course of -

THE COURT: Do not summarize testimony.

200 BY MR. JOHNSON:

Q. Now besides Sergeant Antonelli and yourself, did anyone else, to your knowledge, look at those finger prints that they showed you on that night?

THE COURT: No, I am going to exclude that.

MR. JOHNSON: I asked him if he had to his knowledge.

THE COURT: No, he would not know and in addition, it does not make any difference, it would be irrelevant. Now Mr. Johnson you are taking a little advantage of the liberal ruling that I made in view of the Government's attitude that he could tell his story and he has told his story. I think you are about finished and I mean by finished, I think he has completed his story.

MR. JOHNSON: I think there is something else, your Honor.

THE COURT: But you cannot bring in hearsay twice removed.

MR. JOHNSON: I am going to restrict it to what actually happened.

THE COURT: This is all irrelevant. You know there is only one question for the jury to decide and that is whether this defendant committed the robbery and everything else is extraneous. Proceed but you will have to stay within the framework of relevancy and competency.

MR. JOHNSON: I will try and abide by your Honor's ruling.

201 BY MR. JOHNSON:

Q. With regard to the conversation, did you or did you not, after you looked at this print, have any conversation with Mr. Antonelli about the print? A. I did.

Q. And what was that?

THE COURT: Now Mr. Johnson, you know that is not admissible because you did not confront Mr. Antonelli on cross-examination with anything of this sort and you know the law requires that.

MR. JOHNSON: If your Honor please, I tried -

THE COURT: I hate to proceed this way but you may call Mr. Antonelli back, if you wish, immediately following this witness' testimony.

MR. JOHNSON: May I ask that this witness be excused at the present time and that his testimony be excluded at the present time?

THE COURT: No, he has already testified. You know perfectly well it is an elementary rule that you may not bring in a statement the witness has made unless you first interrogate the witness himself about the alleged statement.

MR. JOHNSON: Your Honor ruled it out, sir.

THE COURT: No, I did not rule it out. You never confronted him with that.

202 THE COURT: What did Mr. Antonelli say about the finger prints?

MR. JOHNSON: He told me that he told Mr. Antonelli that those finger prints did not look alike. And he said, Well I will get someone to say they looked alike.

BY MR. JOHNSON:

Q. Did Mr. Antonelli say who that person would be? A. He said he would get his finger print expert, and say, he would put it up on the screen and have them people look at it and tell them it belonged to me.

Q. Well, now was any other person present besides you and Sergeant Antonelli when that conversation went on? A. My oldest brother and there was another detective, there was about three of them who went down there and there was another one, far off the corner, I don't know whether he heard any conversation or not but he looked like the same man up here in the policeman's uniform.

THE COURT: Just a minute. You have answered the question.

MR. JOHNSON: I am going to ask you again -

THE COURT: No, you cannot ask the same question again.

MR. JOHNSON: Your Honor, I may have used the word again and I will withdraw the word again.

BY MR. JOHNSON:

Q. I wanted to ask you, have you ever been in Mr. Good's car?

203 A. No. I don't even know what Mr. Good's car looks like.

THE COURT: Just answer the question.

WITNESS: No, no.

MR. JOHNSON: Your Honor, please, may he not answer the way he chooses.

THE COURT: No. I have made the ruling. The rule is, Mr. Johnson, the answer has to be responsive. A witness may answer a question any way providing it is responsive.

BY MR. JOHNSON:

Q. With regard to a Safeway store in the 6300 block-

THE COURT: Now you have asked those questions before and he denied participating in this offense. You cannot go over the same type -

MR. JOHNSON: Your Honor, please, I was merely asking him if he was ever in that area.

THE COURT: You have asked the same thing in a different way.

MR. JOHNSON: If Your Honor please, I have no more questions of this witness.

MR. FLANNERY: May we approach the bench?

THE COURT: Yes, indeed.

(At the bench:)

MR. FLANNERY: This defendant has a criminal record, Your Honor, which indicates that on June 8, 1953 in the State of North Carolina, he was convicted of larceny of an automobile and sentenced to 12 months.

204 His birthday is February 24, 1936 so he would have been approximately 17 years of age when that offense was committed in North Carolina. Now if the offense had been committed in the District of Columbia, I do not think there could be any doubt that I could not ask the question.

THE COURT: That is correct.

MR. FLANNERY: However, since he was convicted and it appears he did get a sentence of 12 months, I am wondering whether or not it would be permissible to ask the question?

THE COURT: I think so unless the State of North Carolina has a similar juvenile law such as we have here.

MR. FLANNERY: I do not know that they do.

THE COURT: I do not know either.

MR. JOHNSON: I do not know either.

THE COURT: Of course, I am in sympathy with the rule which would exclude a juvenile record so long as a person behaves himself it seems a juvenile record should not be brought out against him.

MR. JOHNSON: Otherwise, he has actually a criminal record all of his life, all his way through school.

THE COURT: I am going to turn to the exact provision of our Juvenile Act. I think there is too much tenderness to juveniles. Of course, a little boy who pilfers a banana off the fruit stand ought to be dealt with leniently but a person who commits a robbery, it makes no difference whether he is 16, 17, or 18.

205 MR. JOHNSON: He was a passenger in a car and evidently the driver hadn't permission -

MR. FLANNERY: That doesn't say that here, it says larceny of an automobile.

MR. JOHNSON: I am telling you what it is.

MR. FLANNERY: I am telling you what the record says.

THE COURT: The District of Columbia Code, Title 11, Section 915,

relates to the manner in which hearings in a Juvenile Court shall be conducted and also the manner in which the Juvenile Court may dispose of a case before it. It is a long section. The last paragraph of that section provides as follows: "No adjudications upon the status of any child in the jurisdiction of the Court shall operate to impose any of the civil disabilities ordinarily imposed by a conviction, nor shall any child be deemed a criminal by reason of such adjudication, nor shall such adjudication be deemed a conviction of a crime nor shall any child be charged with or convicted of a crime in any Court except as provided in Section 11-914" -- It goes on and says the disposition of a child or any evidence given in Court shall not be admissible as evidence against the child in any case or proceeding in any other court. Now I construe this to mean obviously there is no ambiguity that the disposition being by the Juvenile Court of the District of Columbia shall not be admissible in evidence. It does not relate to a disposition in any other court. I suppose your data
206 does not show whether there is a Juvenile Court or not?

MR. FLANNERY: Your Honor, no, it doesn't show that; this is all it shows.

THE COURT: The charge is larceny of an automobile in juvenile delinquency. I am going to let you ask about that.

MR. JOHNSON: I am going to object, if Your Honor, please.

THE COURT: Very well, your objection is noted.

MR. JOHNSON: If Your Honor please, I will ask him myself.

MR. FLANNERY: That will be all right.

THE COURT: So you may reopen, Mr. Johnson.

(Following bench conference:)

BY MR. JOHNSON:

Q. When you were a juvenile, you were arrested in the State of North Carolina? A. Yes, sir.

Q. For what? A. I was driving a boy's car and he said it was his uncle's and later on, I guess about four hours after we had been riding around, the police stopped us and they said it was stolen. Well the boy, when he approached me, he had me believing it was his uncle's car but

we found out it wasn't. They tried both of us and they found us guilty.

Q. Now, is there any other offense you have ever committed?

207 A. No, sir.

Q. In your life? A. No, sir.

THE COURT: No, you may not ask that. You know perfectly well that is not a proper question.

MR. JOHNSON: If Your Honor please, may I show this?

THE COURT: The Court assumes that counsel knows, and I am sure you do as an experienced lawyer-

BY MR. JOHNSON:

Q. Since that time have you attended school? A. Yes, sir.

Q. What school? A. Kozoda High School

Q. Did you graduate? A. Yes, sir.

Q. Who supported you during your going to school? A. I supported mostly myself.

Q. By doing what? A. By working at various jobs during the summer and after school.

MR. JOHNSON: That is all.

CROSS-EXAMINATION

BY MR. FLANNERY:

Q. Now, your lawyer has brought out the fact you were convicted in 1953 in North Carolina of larceny of an automobile. That is true isn't it? A. Yes, sir.

208 MR. JOHNSON: I don't think he can question that and I object to that.

THE COURT: That is a proper question.

BY MR. FLANNERY:

Q. Now how tall are you? A. About 5'8", I guess.

Q. 5'8" tall. How tall is your friend Jones? A. He is about 5'8 1/2" or 5'9".

Q. A little taller than you? A. Not much.

Q. About the same size but a little taller? A. Just a little, very little.

Q. How long have you known Arthur Jones? A. I guess just about a year. I met him through my twin brother, his sister and my sister-in-law and all of that.

Q. Is he a good friend of yours? A. Yes, sir.

Q. A very good friend? A. Yes, sir.

Q. And did you used to go out together socially? A. Just about twice, twice.

Q. But in any event he was a good enough friend that you would lend him your automobile? A. Yes, sir, I have loaned plenty of people my car.

209 Q. But you loaned Jones your car? A. Yes, sir.

Q. On several occasions? A. Yes, sir.

Q. Now then on August 6, 1957, did you see Jones on that date? A. Yes, sir.

Q. What time did you first see him? A. It was between 6:30 and it was just about 7:00 o'clock.

Q. In the morning or evening? A. In the evening.

Q. That was the first time you saw him that day? A. Yes, sir.

Q. What day of the week was it? A. That was a Tuesday.

Q. Tuesday? A. Yes, sir.

Q. Where did you see him, at your home? A. He was standing out in front of my home, in front of my car.

Q. Where was your home at that time? A. 413 50th Street, Northeast.

Q. Had you previously lived at the Dunbar Hotel? A. Yes, sir.

Q. When did you live there?

210 Q. And had you also given an address on River Road in Maryland? A. Yes, sir.

Q. Had you lived there? A. I was working there and sometimes I stayed up there and when I bought my car I registered it in Maryland, got Maryland tags, because they said it may not pass the District inspection.

Q. You gave a false address? A. It wasn't false, my bossman

had us stay up there.

Q. You lived in Washington but you purchased this automobile and didn't think it would pass the District of Columbia inspection so you gave an address in Maryland? A. I lived there so I gave it.

MR. JOHNSON: I object to his arguing with the witness.

THE COURT: Just a minute, this is proper cross-examination.

BY MR. FLANNERY:

Q. You just stated a few minutes ago you lived in Washington? A. Yes, I lived in Washington and I said I stayed up there at the place, up at the ice house because sometimes I opened it up because I was the first man to make the runs and when I stayed out late I stayed up there.

Q. But you gave the address in Maryland because you did not think the car would pass the District of Columbia inspection? A. That
211 is what they told me.

Q. That is what you did when you bought the car? A. And I was intending to move out there.

Q. You didn't live there at the time? A. No, sir.

Q. You didn't pay taxes in Maryland? A. Just income tax, just working out there.

Q. You didn't pay any income tax in Maryland because you didn't live there? A. I was in Maryland. I was working in Maryland. I don't know where they took it out. I sent it in.

Q. You lived in Washington, didn't you? A. Most of the time, yes, sir.

Q. You say you saw your friend Jones on August 6th? A. Yes, sir.

Q. What time? A. Between 6:30 and 7:00 o'clock.

Q. Did you have a conversation with him? A. Yes, sir.

Q. About the automobile? A. Yes, sir.

Q. Who else was present? A. When I was talking to him at my home?

Q. Yes. Who else was present? A. My sister-in-law, my twin brother, and my sister-in-law's sister, and that is all.

212 Q. What are their names? A. Gwendyln Harris.

Q. Is she in the witness room? A. I don't know.

MR. JOHNSON: He has been in custody, Mr. Flannery.

BY MR. FLANNERY:

Q. Have you told your lawyer you sent a subpoena to Gwendlyn Harris?

MR. JOHNSON: I will object to that, what he told his lawyer.

THE COURT: I will sustain the objection because that is a privileged communication.

BY MR. FLANNERY:

Q. You don't know whether Gwendyln Harris is here today or not, do you? A. I don't know other than the people I see.

Q. Who else was there at that time? A. Georgia Harris.

Q. Is she here today? A. I don't see her.

Q. Who else was there? A. My twin brother.

Q. What is his name? A. Kenneth Bynum.

Q. Now did you lend Jones your car? A. Yes, sir.

213 Q. Did you give him the keys to the car? A. Yes, sir.

Q. Was anyone else with him when he left in the car? A. Georgia Harris.

Q. Now then what time was that when he left in the car? A. I guess it was about 7:00 o'clock or a little later, I guess.

Q. Where does Georgia Harris live? A. I don't know.

Q. How long have you known her? A. Ever since I have known my sister-in-law.

Q. How long has that been? A. Since 1954.

Q. Have you known her since 1954 and yet don't know where she lives? A. No, sir.

Q. Does your brother know where she lives? A. No, sir.

MR. JOHNSON: I object to what his brother knows.

THE COURT: Just a minute. You may not make such statements. If you have an objection you may state your grounds in legalistic phraseology but you may not make such statements in front of the jury.

BY MR. FLANNERY:

Q. Do you know whether or not your brother knows where Georgia Harris lives?

214 MR. JOHNSON: Objection.

THE COURT: The objection is overruled.

A. No, sir, I don't.

Q. Did you make arrangements with your friend Jones at that time to have your car returned? A. I told him to return my car when he finished.

Q. And what did he say as to when he could return the car? A. He said he would bring it back that night or either the next morning.

Q. Did he bring it back the next morning? A. No, sir.

Q. When did you next see your car? A. That Thursday.

Q. Which was what date? A. I guess that was August 8.

THE COURT: This might be a convenient time to suspend for our usual mid-morning recess.

THE MARSHAL: This honorable Court stands recessed for a period of ten minutes.

AFTER MID-MORNING RECESS

THE COURT: We will wait for Mr. Johnson and then you may proceed Mr. Flannery.

BY MR. FLANNERY:

Q. Now Mr. Defendant when Jones did not return your car the next morning, the morning of August 7, did you call him? A. No, sir.

215 Q. Did you make any efforts to find out where your car was? A. Later on that afternoon I went over in Southeast.

Q. The evening of August 7th? A. August 7, yes, sir.

Q. And you did go over in Southeast the evening of August 7. What did you do over there? A. I went over to his father's house where he was suppose to live.

Q. Did you see Jones there? A. No, sir, he wasn't there and I didn't see him.

Q. What did you then do about your car? A. Well I went down to a cleaners where his uncle ran and I had my suit down there and I had it

with me when I went over there.

Q. Was that on August 7? A. Yes, sir.

Q. Did you see Jones on August 7? A. No, sir.

Q. Did you see Jones on August 8? A. Yes, sir.

Q. Let me ask you. Going back to August 6, what did you do during the day of August 6th? A. Of August 6? Let's see, I think I was home most of the time.

216 THE COURT: You were not working?

WITNESS: No, sir, not that Tuesday.

BY MR. FLANNERY:

Q. You didn't work that Tuesday. Did I understand you to say on direct examination you had been employed at that time? A. Yes, sir, but I was changing jobs.

Q. You were not employed on August 6? A. Not on that date.

Q. When had you last been employed? A. I guess it was about August 4th or 5th.

Q. The 5th or 4th? A. Yes.

Q. Where? A. With Benny Brown.

Q. Benny Brown? A. Yes, sir.

Q. Who is Benny Brown? A. He works on radios and TVs.

Q. Is he a friend of yours? A. Yes, sir, of my family's.

Q. How long had you been employed by Benny Brown? A. Since I guess it was July, since July.

Q. You did work for Benny Brown from July until August? A. Yes, sir.

Q. Only a month? A. Yes, sir.

217 Q. Where had you been employed before that? A. At Talbott's Ice Service.

Q. Were you or were you not at home the morning of August 6th? A. I think I was, yes, sir.

Q. Well can you be more definite? Do you know whether or not you were or were not? A. Yes, sir, I was home.

Q. Did there come a time when you went out on August 6? A. Let me see, wait a minute. Oh, yes, I know that was the day I went out to apply for that job.

Q. Where did you go? A. Out to Sears Roebuck.

Q. What time? A. I guess it was about 8:00. No, it was before I went with my brother, it was about 7:15 A. M.

Q. In the morning? A. Yes, sir.

Q. And how long did you stay over there? A. I stayed over there until around 8:30.

Q. Then where did you go? A. I went back home, I think, and that is when I stayed home from then on.

Q. When did you next go out on that day? A. I don't think I went out until that night.

218 Q. What time? A. I guess it was around 9:30 or something to ten.

Q. Who did you go out with? A. Mr. McC lain.

Q. McClain or McCann? A. McClain or McCann, it is Mac something.

Q. Is he a friend of yours? A. Yes, sir.

Q. Where did you go with him at 9:30? A. Down to the pool room.

Q. What pool room? A. It is between 49th and 50th Street, or let's us see, wait a minute, it is on Grant Street between 49th and 50th.

Q. Who did you see there? A. It was, I guess it was four boys, four other boys.

Q. What were their names? A. I don't know them.

Q. You don't know their names? A. No, sir.

Q. How long had you known them? A. I don't know. You know I went, when we went in the pool room there were some guys playing pool so I got a pool table and we shot pool.

Q. What is McCann's full name? A. We call him Jim, that is all I call him, McCann.

219 Q. Jim McCann, where does he live? A. He lives down at the apartment. Let's see on the left hand side, on second floor.

Q. Don't you know his address? A. 413 50th.

Q. 413 50th? A. The same apartment we lived in.

Q. How long have you known Jim McCann? A. I guess about a year. Let me see, we moved there in 1955 so it was more than that; it was from, I guess, six months after we were, in 1955, after we had moved.

Q. What time did you arrive at this pool room? A. I guess it was around 10:00 o'clock, or a little before, maybe.

Q. Ten o'clock? A. Yes, sir.

Q. How long did you stay there? A. Until I guess about twenty minutes until twelve or something like that.

Q. From ten until twenty minutes till twelve? A. Yes, sir.

Q. During that period of time did you see anyone whose name you can give to the Court and jury? A. No one that I knew other than the lady who ran the pool room.

220 Q. Did the lady who ran the pool room see you there? A. Yes, she saw me.

Q. Did you talk to her? A. When we paid her.

Q. What is her name? A. I don't know.

Q. How long have you known her? A. A year.

Q. Did you go to that pool room quite frequently? A. No, sir, I didn't know they stayed open that late until my brother told me. I think it was about a month or so before that that was about the third or fourth time because I had just started shooting pool real good.

Q. Did McCann come to your house that evening? A. We were downstairs after I finished using the telephone he asked me, Clayborne, do you want to go and play some pool?

Q. Who was present when he asked you that? A. I think it was the lady that owned it, Miss Sarah Branch, or Miss Frances Sarah Branch. I think there were some more women down there.

Q. How many women were down there at that time? A. I think the lady upstairs.

Q. What is her name? A. I don't know her last name, I just know most of them by their first names.

221 Q. What are their first names? A. Let me think. I can't, let's see, Branch, Branch.

Q. Who else was there? A. Let me see. I think his wife, I think she was there too.

Q. Do you know Officer Kutner? (Stand Officer Kutner, please.) A. Not that I know.

Q. Did you see him the evening of August 9 after you had been arrested? A. I don't know, it was about 8:00 or 9:00 o'clock that they took us in and I don't know. Why I only remember the one in the middle, (pointing) that one.

Q. Didn't you tell Officer Kutner you had remained home all day, August 6, 1957? A. I don't think so. I don't think I talked to him. I think I talked to Mr. Antonelli or whatever his name was.

Q. Didn't you tell Officer Kutner that you had stayed home all day on August 6, 1957?

MR. JOHNSON: If your Honor please, I think this is improper.

THE COURT: Objection overruled, this is proper.

MR. JOHNSON: May I make an objection at the bench?

THE COURT: No, no, do not interrupt.

WITNESS: I don't think I talked to him.

222 BY MR. FLANNERY:

Q. Do you deny you told him that? A. I deny that because I don't think I talked to him.

Q. You didn't go roller skating the evening of August 6, 1957? A. No, sir, it was August 7, that was the reason for most of the phone calls because.I was preparing, I always call them and tell them, to be ready because I am coming and pick them up and we go skating.

Q. When did you see your automobile next after having lent it to Jones on August 6th? A. I guess it was August 8.

Q. August 8? A. Yes, sir, around noon or 1:30 or something like that.

Q. You learned on August 8, did you not, that the police were looking for your car? A. Yes, sir, that is what he told me.

Q. Jones told you that? A. Yes, sir.

Q. Well did you take your car and drive it down to the police and ask them why they were looking for it? A. No, sir.

Q. You did not? A. No, sir.

Q. You lent the car to your brother to use after you had found out that the police wanted it, didn't you? A. Yes, sir.

223 Q. When you received a call from the police on August 9, you were under the impression that your brother had violated some traffic regulation? A. No, it was Jones, I knew what he had done.

Q. You knew what he had done? A. Arthur Jones when he told me they were looking for the car I knew they were looking for it for so I said I didn't have anything to do with it but that is you and them.

Q. But it was your car? A. I didn't know. My brother explained to me that day that anything involving my car involved me. I told him the same thing.

Q. According to your testimony you knew your car had been involved in something which made the police want that car? A. I don't know whether they wanted the car or wanted him.

Q. You knew your car had been involved in some wrong, did you not? A. Yes, sir, an accident.

Q. You didn't take the car into the police? A. No, sir, because I didn't hardly believe him.

Q. When you were told to come into the precinct you thought your brother had violated some traffic regulation? A. No, sir, I knew nothing of any traffic law.

Q. You were told to come in? A. To see what they were holding
224 my brother for robbery for.

Q. Yes. Now then you were then arrested and taken down and your finger prints were taken, is that right? A. Not right away.

Q. Later that evening? A. What do you mean? After I was down there and you mean when I went to 14th Precinct?

Q. You went to the 14th precinct there and went to the identification bureau and had your finger prints taken, didn't you? A. Yes, sir.

Q. Did there come a time that evening when you were told your finger print had been lifted from the car of the victim of this robbery?

A. Late that night --

MR. JOHNSON: I object to this.

THE COURT: Objection overruled, you brought that out on direct examination.

A. (Witness continuing): Late that night they told me that.

Q. Did there come a time when you were told the prints matched?

A. That was at the same time that they told me they had the prints when they printed me after they got my car. I heard one of them tell the other

225 one to go get my car and bring it into the precinct right at the time we got at the door where they take finger prints.

Q. Can you explain to his Honor and to the jury how it was this finger print was found in the car of the victim of this robbery? A. Yes, sir, I can.

Q. Can you explain that? A. They did not take them off of that man's car because I was never in that man's car. They took those prints off of my car and they are using them against me and anybody can see they are framing me.

Q. You testified that the police are framing you? A. Yes, sir.

Q. They didn't take prints from Mr. Good's car? A. Yes, sir.

Q. But from your car? A. Yes, sir.

Q. And it is your testimony, therefore, that Mr. Dion, who has testified in this case, has testified falsely and has committed perjury?

MR. JOHNSON: I object to that.

THE COURT: I will sustain that objection.

BY MR. FLANNERY:

Q. You said, to use the terminology of laymen, you have been framed? A. I said if anybody says that finger prints came from off the

226 rear view mirror of Mr. Good's car, they are lying.

MR. FLANNERY: Very well, Mr. Defendant.

THE COURT: You may step down.

MR. JOHNSON: Just a second, I have a couple more questions.

THE COURT: Very well.

REDIRECT EXAMINATION

BY MR. JOHNSON:

Q. You have been talking about the question of those being your fingerprints that came off Mr. Good's car. In addition to what you have already testified, sir, was any other person present that disputed the fact that those prints were yours?

THE COURT: Just a moment. I am going to exclude that. You know that is not admissible.

Will counsel come to the bench?

(At the bench:)

THE COURT: I am going to say this out of the hearing of the jury so as to not prejudice your client in the eyes of the jury. I think on several occasions Mr. Johnson, and I say this calmly and deliberately, without any anger because I am not angry, I am just disgusted. On several occasions during this trial you have transcended on what I consider to be the ethical ethics of a trial lawyer. You may go back and proceed now.

(Following bench conference:)

227 MR. JOHNSON: That is all I have of this witness.

* * * * *

VINCENT ANTONELLI

having been previously called as a witness on behalf of the government, was recalled by the defense and, having been reminded he was still under oath, was examined and testified further as follows:

DIRECT EXAMINATION

BY MR. JOHNSON:

Q. Now, did you have a conversation with Clayborne Bynum and with Kenneth Bynum and with any other Bynums about finger prints?

A. I talked to the defendant and his older brother.

Q. Did you have any conversation with Kenneth Bynum about

228 finger prints? A. No, sir.

Q. Did you show him any finger prints? A. No.

Q. Did you show any other member of the Bynum family finger prints? A. No.

Q. This defendant, did you show him any finger prints? A. No, I never showed him any finger prints.

Q. Did you tell him why he was arrested? A. Yes, sir.

Q. Did you tell him what evidence you had against him? A. I told this defendant we had received reliable information a car registered with his tag number, we traced it out, and the car was later brought in by his younger twin brother to the precinct.

MR. JOHNSON: Keep your voice up, I can't hear you, sir.

WITNESS: I told the defendant that his car or a car answering his car's description with Maryland registration, was seen at the scene of the Safeway Store at New Hampshire Avenue, which is over in Maryland where Mr. Good works, by a witness who saw a colored man in the shadow near the store. This witness is also an employee of the store. She drove around the block and she saw this car move off. She had taken the tag number of this car and she came back and Mr. Good was just about

229 to come out of the Safeway Store and to lock the front door. He was the last man to leave and as he was getting toward his car parked nearby, she approached him at the time and warned him of what she had seen, to watch out for himself, since he was alone. Then the following morning, she didn't know anything had happened to Mr. Good.

MR. JOHNSON: I ask Your Honor may I ask your Honor to instruct the witness to answer the question.

THE COURT: No, you will have to ask your questions with a certain degree of order. Every witness, no matter who it is, is entitled to courteous treatment, even the defendant, and he received courteous treatment on the witness stand.

MR. JOHNSON: May I ask your Honor to instruct the witness to answer the question?

THE COURT: I do not think the witness requires any instruction

from The Court, certainly not at this juncture, I think he is answering your question, perhaps he is answering it in detail.

As a matter of fact, your question is entirely inadmissible. This whole line of inquiry is inadmissible but the Government has not objected so I am not excluding it.

MR. JOHNSON: Go ahead, sir.

A. (Witness continuing) The following day this witness came to work at the Safeway Store and she found out something happened to Mr. Good.

230 THE COURT: Just a minute. Do I understand correctly this is what you told the defendant?

THE WITNESS: This is how we got his tag number.

THE COURT: What car it is? Now is this what you told the defendant? Just answer the question.

THE WITNESS: Yes, sir.

THE COURT: You are summarizing now what you told the defendant?

THE WITNESS: Yes, sir.

THE COURT: Then it is responsive.

BY MR. JOHNSON:

Q. On the night of his arrest? A. Yes, sir.

Q. Go ahead and tell the jury and His Honor. A. As I have said we found out the tag number of the car, that is when I had previously testified I called Baltimore by telephone and got a listing on the car and through Maryland authorities, I found out who the car was listed to which was Clayborne Bynum at a given address on River Road in Maryland. That evening and with Detective Sergeants Kutner and Young we made arrangements with the Maryland Police and we got what information they had on Clayborne Bynum. We then went to the River Road address, which was an ice house and soft drink stand. We didn't find Clayborne Bynum there or his car and coming back to the Police Office in Montgomery County, we found he had been arrested and his address was 413 Fiftieth Street, N.E., Washington, D.C. We proceeded from Maryland back to

231 D. C. and searched for that address and that area for that car. We did not locate the car.

MR. JOHNSON: Your Honor, I am going to ask Your Honor to instruct the witness to -

THE COURT: Now the question you asked, is what did you tell the defendant when you interviewed him?

MR. JOHNSON: Yes, sir.

THE COURT: Did you tell him all of this?

THE WITNESS: That is exactly what I told him, Your Honor.

THE COURT: Very well.

A. (Continuing): I told him we had left his home at 413 50th Street, N. E. and didn't make any inquiries, which is an apartment house, that we didn't want to disturb anything or anyone and we then checked the telephone book and found him listed at the Dunbar Hotel. We then checked there and found he had registered there at one time. And we left the Dunbar Hotel and went back to 413 50th Street and searched the immediate area for this car with the Maryland tag on it. We did not find it and came back to the office. It was then around midnight. I received authority from Inspector Tolsom to type up a teletype.

Q. You told this defendant this? A. I didn't tell him about the teletype.

THE COURT: The question was, as I recall it, and I am perfectly willing to be corrected if I am wrong, your question was: What did you

232 tell the defendant? Did you tell all this to the defendant?

THE WITNESS: Yes, sir, except I didn't tell him what Inspector Tolsom said about the teletype or that I had sent out a teletype for his car in connection with the robbery of Mr. Good.

BY MR. JOHNSON:

Q. How did you know at that time this car was involved with the robbery? A. Because the answer, the general description given me by the witness that a black -

Q. An old car? A. An old black car.

Q. Mr. Good told you that? A. No, sir, he didn't tell me that.

THE COURT: Please do not cut off the witness. I know you do not mean to be discourteous but in your field the result -

MR. JOHNSON: It is very difficult to restrain myself.

THE COURT: I think before we get too far away from the question I better ask the reporter to read the question.

(Reporter: Did you tell him what evidence you had against him?)

MR. JOHNSON: That isn't the question.

THE COURT: Is that the question, Mrs. Mallon?

233 REPORTER: That is the question.

THE WITNESS: And about 1:30.

MR. JOHNSON: Just answer the question.

MR. FLANNERY: The witness was attempting to answer the question.

THE COURT: Now Mr. Johnson, do you wish to withdraw the question?

MR. JOHNSON: I wish to call the attention of The Court to the fact he is reading from a paper.

THE COURT: Just a moment. You know perfectly well what you are doing is irregular. Do you want the question answered or do you wish to withdraw it?

MR. JOHNSON: No, sir, I don't want to withdraw it. If Your Honor please, may I have the paper that he has been reading from.

THE WITNESS: He has seen this paper.

THE COURT: You have seen it?

MR. WITNESS: Your Honor, this eye witness, the one the Safeway Store identified as a Jenny Mannix is the one who supplied the tag number Maryland JK 10850, the employee in the Safeway Store.

MR. JOHNSON: May I ask him to keep his voice up; I can't hear him.

THE COURT: I think it is true that he speaks a little low. You will have to speak a little louder.

234 THE WITNESS: These tags had a green and white background.

MR. JOHNSON: I am objecting to his answer because it is not responsive. The question is I want to know what he told this man as to

why he was arrested?

THE COURT: The question that is pending that the reporter re-read: Did you tell him the evidence you had against him or words to that effect. I can only say to you, Mr. Johnson, if you do not want the answer given I will permit you to withdraw it but the witness may answer in his own way.

MR. JOHNSON: I will withdraw it.

BY MR. JOHNSON:

Q. Mr. Antonelli, what time did you first have a conversation with Clayborne Bynum? A. I was called at home about five minutes till seven on Friday, August 9. It was my day off. I was told that Clayborne Bynum—

MR. JOHNSON: If Your Honor please, instruct him to answer the question.

THE COURT: I suggest you confine your answers to the precise questions asked.

A. (Continuing) And about 7:15 the evening of August 9, on a Friday -

Q. Do you know what date his car was brought down to headquarters? A. Which car? Was Defendant's car brought down at the time?

235 Q. Did you order his car brought to headquarters, sir? Yes or no? A. Not to my knowledge.

Q. Now with regard to this defendant, when you talked to him, was his car there?

THE COURT: Will counsel come to the bench?

(At the bench:)

THE COURT: Now Mr. Johnson, as a member of the bar you are charged with the knowledge of the rules of evidence and I know from past experience with you, that you do know the rules of the law.

MR. JOHNSON: I want the record to show that I am now objecting to the witness' testimony.

THE COURT: What is your question?

MR. JOHNSON: My question is my client -

THE COURT: What is the relevancy of your question?

MR. JOHNSON: My client claims the finger prints were taken off his car. I want to show before the finger prints were presented to him or before the comparisons were made, that they had his car brought down there.

THE COURT: You are permitted to do that but confine your questions to the particular matters you want to show.

MR. JOHNSON: In addition, Mr. Flannery on cross-examination has brought out the conversation he had with Mr. Antonelli, and also he has brought out the conversation he had with him as to where he went and what he did. I want to verify those.

236 THE COURT: Oh, no, you cannot verify your own client's statement.

MR. JOHNSON: I want to elicit this: Since it would be admissible upon rebuttal, I do not see any reason why I could not do it in the interest of time.

THE COURT: Your client has answered certain questions concerning conversations he had with Mr. Antonelli.

MR. JOHNSON: Yes, sir.

THE COURT: You may not call Mr. Antonelli in order to corroborate these statements. Mr. Flannery has the right to call Mr. Antonelli to contradict the statements.

MR. FLANNERY: I think that is correct. I think Your Honor is precisely correct. I want to know the tender, what information?

THE COURT: I am going to let you do this. You know we are not in the Mallory field here. There is no damaging statement being offered. We are not in the McNabb or Mallory area. I allowed you considerable liberty when the defendant was on the stand because I always feel that a defendant should be permitted to tell his story and he has done so. From here on we are going to adhere strictly to the rules the law prescribes.

MR. JOHNSON: I agree and that shall be my procedure; I don't want to offend you, Your Honor.

THE COURT: I think if we did not have rules of evidence a great

many people would be convicted on flimsy evidence. It works both ways.

237 MR. JOHNSON: If Your Honor has observed my feelings, I am convinced my client is innocent.

THE COURT: You know I am not interested in a lawyer's personal conviction of guilt or innocence of the client. As a matter of fact, as you know, of course, it is improper in an argument before a jury for a lawyer to assert his own belief for his clients. I want to say this: I think a lawyer can do a better job if he has no views of which he is convinced for then he becomes more objective. It is like a doctor if he offers sympathy -

MR. JOHNSON: I have a great respect for the law, that is I feel a little bit offended to -

THE COURT: Of course, I do not want any miscarriage of justice but whenever I have any doubt in my mind of a defendant's guilt, as has occurred on occasions, I have always communicated that to the jury.

MR. JOHNSON: I know you do.

THE COURT: Because there is one thing I do not ever want to have to do, and that is to send an innocent man to a penal institution. If we stay calm and objective, we can all do better in the interest of justice.

(Following bench conference:)

BY MR. JOHNSON:

Q. When you came into Headquarters that evening, did you know whether or not Clayborne Bynum's car was there? A. No, sir.

238 THE COURT: You know I think we can shorten matters. Perhaps there can be a stipulation that will save a long line of inquiry. Can we stipulate as to the time when the defendant's car came into the custody of the Police Department? I think that is what you are trying to ascertain from what you have said at the bench.

MR. JOHNSON: Yes.

MR. FLANNERY: I do not know the time myself but I could very simply ask the officer this, Your Honor.

Do you know when the car was brought there?

THE WITNESS: No, sir, I saw the Bynum [car] in the basement after I got there.

THE COURT: When did you first see the car in the basement?

THE WITNESS: It was around eight o'clock, to the best of my knowledge.

THE COURT: What night?

THE WITNESS: On Friday night.

THE COURT: That would be the same-

THE WITNESS: The same day the defendant and his brother -

THE COURT: I think there was testimony in the Government's case that - anyway they did not introduce evidence as to the fact that the defendant's car was taken to Police Headquarters.

239 MR. FLANNERY: That was the victim's, Your Honor, on August 7.

THE COURT: Mr. Flannery is there any officer present from whom you can ascertain the exact time when the defendant's car came into the custody of the Police Department? If you wish, you may go and consult them and that may save a line of inquiry.

MR. FLANNERY: Your Honor, I am informed by the officers there is testimony to this effect: On August 9 and around 3:30 P.M. the defendant's brother was arrested in this automobile. The defendant, himself, came into the precinct around 4:30 P.M. on August 9 and, although, I do not have here the officer who could testify specifically as to the time the defendant's car was brought to Police Headquarters, naturally when this officer testified he saw the car there on August 9, several hours later, it is obvious.

THE COURT: The Government is willing to stipulate the defendant's car was taken into police custody on August 9? Do you agree?

MR. FLANNERY: Yes, Your Honor.

MR. JOHNSON: Yes, sir, Your Honor.

THE COURT: Very well, you do not need any evidence on that point.

MR. JOHNSON: The only evidence I have is why it was there.

BY MR. JOHNSON:

Q. Who was in charge of this case, Mr. Antonelli? A.; There

240 were four of us officers. Myself, Sergeant Gray, Detective Sergeants Ray Kutner and Young. Since I was going off two days, Thursday

and Friday were my two days off, these two officers were continuing their investigation and if anything developed they were supposed to call me at home so there would be four of us officers.

Q. On the 9th who was in charge of this case? A. Sergeant Kutner and Sergeant Young were down at headquarters, they were handling the case at headquarters and called me at home to come down, that this man had been picked up.

Q. Did they talk to you before you got there? A. Yes, sir.

Q. This recital they referred to had they gone over that before you got there? A. I don't know, sir, I wasn't present.

Q. At the time you talked to Clayborne Bynum did you ask him where he was?

THE COURT: No, I am going to exclude all of that. I have told you my views as to the applicability of the rules of law at the bench conference.

BY MR. JOHNSON:

Q. Did you ever get to meet a Georgia Harris? A. I have never seen her, sir.

Q. Did you ever get any information about her? A. Yes, sir.

241 Q. When was the first time you heard her name? A. I heard her name mentioned that evening.

THE COURT: Just a moment. I am going to exclude all that, Mr. Johnson, you must comply with the Court's ruling.

MR. JOHNSON: This is not that, Your Honor, this is something else.

THE COURT: That is absolutely irrelevant.

BY MR. JOHNSON:

Q. Did there come a time, to your knowledge, that Georgia Harris was in police custody?

THE COURT: No, I am going to exclude all of that. You can call Georgia Harris as a witness if you want to. Or, either side can call Georgia Harris.

BY MR. JOHNSON:

Q. Do you know whether or not Georgia Harris was a fugitive from the District of Columbia and absent from the District of Columbia?

THE COURT: No, I am not going to allow that for obvious reasons.

BY MR. JOHNSON:

A. Is Georgia Harris a fugitive from the District of Columbia?

Q. Yes.

A. Not to my knowledge.

Q. Didn't you come to my office one day along with other police officers, when I represented this defendant, there was a party in this

242 town that knew the whereabouts of Jones and you and other officers came to my house about it? To my office? A. Yes, sir, we went to 921 New Jersey Avenue and waited for you to come in.

Q. Now I told you at that time something about Georgia Harris? A. We had that information prior to that.

Q. So you did have the knowledge that Georgia Harris had returned to town? A. That Georgia Harris was not a fugitive from this case.

Q. Mr. Antonelli, will you kindly answer the question I asked you, sir? A. Yes, sir.

Q. You did have knowledge that Georgia Harris, who was in the car with Jones, had returned to the District of Columbia, didn't you? A. On Friday, August 7?

THE COURT: Just a moment. What are you trying to establish?

MR. JOHNSON: I am trying to establish that Georgia Harris and this fellow, Arthur Jones, had left this place of Clayborne Bynum's at 6:30 in the evening with this car, and that Harris stayed with Jones up until some time -

THE COURT: We are not interested in that, that is irrelevant. I thought you wanted to establish that Georgia Harris is a fugitive from the District of Columbia.

243 MR. JOHNSON: Yes, sir, she is.

THE COURT: I will let you establish that but you must stay within the confines of my ruling. I must say you have wasted quite a bit of time, Mr. Johnson.

MR. JOHNSON: Your Honor, I think she is a fugitive.

THE COURT: You can bring that out.

BY MR. JOHNSON:

Q. Did information come to you that Georgia Harris and this other man, Arthur Jones, had been together since this offense occurred? A. Yes, sir, you gave me that information.

Q. Did there come a time when you found out she had been out of the city with him and you had completely given him up and had - ? A. That was the information you furnished.

Q. Didn't you find out that was true? A. No, sir, that was new information.

Q. Didn't information come to you, since four of you were in the case, of course, someone of the four of you had actually talked to Arthur Jones when he came back into this jurisdiction? A. Not to my knowledge.

THE COURT: Officer, do you have any information as to the whereabouts of Georgia Harris?

THE WITNESS: No, sir, I do not, Your Honor.

244 THE COURT: And you do not know where she is?

THE WITNESS: We had received a telephone call from Mr. Johnson saying he knew where Jones was going and going to be.

THE COURT: No, that is not responsive to the question. I am going to ask you not to go into that. You do not know where Georgia Harris lives?

THE WITNESS: We had an address at 908 Third Street, Southeast.

THE COURT: Yes.

THE WITNESS: And it has been checked, the officers have been by there to talk to her.

THE COURT: How recently?

THE WITNESS: I do not know the recent date.

THE COURT: But officers have talked to her at that address?

THE WITNESS: Yes, sir.

THE COURT: Very well.

Is there anything else?

BY MR. JOHNSON:

Q. Did you have any conversations at all, not what the conversations were, understand now, with Kenneth Bynum, John Bynum, and Charles Bynum?

THE COURT: I am going to exlude that; that is absolutely irrelevant and you know it, Mr. Johnson.

245 MR. JOHNSON: The fact he had them, sir, not the contents.

THE COURT: I know but you know that is irrelevant.

MR. JOHNSON: That is all.

MR. FLANNERY: I have no examination of this witness.

THE COURT: You may step down.

(Witness left the stand.)

MR. JOHNSON: Now Kenneth Bynum.

Whereupon

KENNETH BYNUM

was called as a witness on behalf of the Defendant and, having been first duly sworn, was examined and testified as follows:

THE COURT: Now Mr. Johnson, I am going to confine you strictly to the rules of evidence.

DIRECT EXAMINATION

BY MR. JOHNSON:

Q. Will you state your name, sir? A. Kenneth Bynum.

Q. Where do you live, sir? A. 3948 C Street, Southeast.

THE COURT: You will have to talk so we can all hear you, speak loud, slowly, and distinctly. Where do you live?

THE WITNESS: 3948 C Street, Southeast.

BY MR. JOHNSON:

Q. Are you related to the defendant, Clayborne Bynum? A. Yes, sir.

* * * * *

252 THE COURT: You may proceed.

MR. JOHNSON: May we approach the bench, Your Honor, please.

(At the bench:)

MR. JOHNSON: I want to make a tender as to why I am unable to show the - explanation - I want to make an explanation to the jury why I am unable to produce the lady in the car.

THE COURT: This is not the proper time. This defendant is under cross-examination and you cannot interrupt cross-examination.

MR. JOHNSON: This is not the defendant, Your Honor, please.

THE COURT: Kenneth Bynum on direct examination?

MR. JOHNSON: On direct examination.

THE COURT: This is no time to make a tender. Now the only way you can make a tender is to call a witness and give testimony through a witness.

MR. JOHNSON: I did not want to ask the question unless I had been informed by Your Honor that I could.

THE COURT: Yes. What is the question?

MR. JOHNSON: The question, the testimony I want to bring out is this: That some time after Clayborne Bynum was arrested and because they knew of the importance of Virginia Harris' testimony, they kept a sharp look out for Miss Harris.

253 THE COURT: Who is that?

MR. JOHNSON: The Bynum family. When they found out she was in town they called the Police Department and told them where she was and where she could be found and if they would go get her and bring her to the precinct that she would know where Arthur Jones was, that she had left with him that night.

THE COURT: I thought her name was Georgia.

MR. JOHNSON: I want to make this explanation, Your Honor, I keep referring to December 6.

THE COURT: And that is a slip of the tongue?

MR. JOHNSON: Unfortunately we had an accident in my family on December 6 and the date is recent in my mind and I do not seem to be able to get it out of my mind.

THE COURT: It seems to me that what you have said is irrelevant. You have a right to show why you are not calling Georgia Harris.

MR. JOHNSON: Yes.

THE COURT: Of course, the fact is I think it is very important from your standpoint to show, if you have evidence available, the only way to show that is that you cannot find her now, not that she was available some months ago.

MR. JOHNSON: I think we have established she is a fugitive and that she is harboring this man Arthur Jones.

THE COURT: That has not been established. If you can establish she is a fugitive today, that is all you need to do to prevent Mr. Flannery from commenting on her absence.

254 MR. JOHNSON: May I then comment on the fact she was in police custody and they could have produced her and would not?

THE COURT: The police do not issue warrants or subpoena witnesses.

MR. JOHNSON: Yes, I agree with you but the Police Department had it within their power to arrest her as a material witness in this case.

THE COURT: A person cannot be committed as a material witness except by order of The Court. The police cannot do that themselves. I do not know the feeling of other judges but before I commit another person as a material witness they would have to make a pretty strong showing to me.

I was asked one time to commit a complaining witness in a robbery case over night because he was an alcoholic and they thought he might not show up the next day.

MR. FLANNERY: I never heard of one being committed.

MR. JOHNSON: I have represented two.

THE COURT: As far as this Court is concerned a commitment of a material witness is very, very rare. Now I have committed a material witness on two occasions, a person who was an accomplice to a crime, which is entirely different, but I would not commit an innocent bystander. That is too much of a price to pay for the administration of justice. You know liberty is the most precious thing we can have next to our lives and we do not dispose of it carelessly.

255 (Following bench:)

BY MR. JOHNSON:

Q. I wish to call your attention to your testimony prior to the luncheon recess, you were telling us about a television program. What time, with reference to the time, was it, if you recall, when you were viewing Wide Earth, or thereabouts, that your brother Clayborne left the premises, if he did?

MR. FLANNERY: I object and, of course, I objected before when Mr. Johnson had suggested the time.

THE COURT: I am going to sustain the objection in view of the fact that Mr. Johnson, in one of his last questions before the luncheon recess, suggested time in a leading question. I think that precludes this witness from testifying with regard to that aspect.

BY MR. JOHNSON:

Q. Can you tell us what program it was, without regard as to the time, that your brother was watching, when he left your apartment to go downstairs? A. It was after Wide Earth was going off and Broken Arrow-

THE COURT: What program?

THE WITNESS: Broken Arrow.

BY MR. JOHNSON:

Q. Now did there come a time after he left that he came back to the apartment? A. Not while I was there, no.

256 Q. What time did you leave? A. I left shortly before 11:00.

Q. Where did you go, sir? A. I went to work.

* * * * *

259 CHARLES GUYDON BYNUM

* * * * *

DIRECT EXAMINATION

BY MR. JOHNSON:

* * * * *

266 Q. Did there come a time when Sergeant Antonelli showed you something along with your brother? A. I was shown, yes.

Q. What? A. I was shown a finger print.

Q. What, if anything, was said about the finger print? Do you know approximately what time this was?

THE COURT: Well now you have two questions in one. Which question do you want to ask?

MR. JOHNSON: I will withdraw the question about the finger print and ask what time of day, approximately was this?

THE WITNESS: I doubt that I could fix the time with any definite answer.

BY MR. JOHNSON:

Q. How long period time was it after you got to the headquarters that you saw this print, approximately? A. I would estimate it was approximately one and half to two hours.

Q. After you got there? A. Yes.

Q. What time did you leave your place of employment, sir, approxi-
267 mately? A. I would say approximately nine o'clock. I am not-

Q. Now with regard and do not answer this question until Mr. Flannery has had an opportunity to object, did you, after viewing of this print, at the suggestion of Mr. Antonelli, have a conversation with Mr. Antonelli.

MR. FLANNERY: I object. That would be hearsay.

THE COURT: Objection sustained.

BY MR. JOHNSON:

Q. Don't answer this until Mr. Flannery has had an opportunity to object, but did Sergeant Antonelli make any remarks to you about the similarity or dissimilarity of that print? Those prints?

MR. FLANNERY: I object.

THE COURT: Objection sustained on two grounds. First it is hearsay and second, Sergeant Antonelli was not interrogated concerning this matter on cross-examination. Therefore, any alleged contradictory statement made by him would not be admissible because no foundation has been laid.

MR. JOHNSON: Your Honor, I think Sergeant Antonelli denied -

THE COURT: I do not think you interrogated him concerning any

conversation with this witness. You interrogated him concerning a conversation with the defendant. Sergeant Antonelli said he did not
268 show the finger prints to the defendant. He was not asked by you whether he showed the finger prints to this witness.

MR. JOHNSON: I may be mistaken, Your Honor, please.

THE COURT: I am quite sure. Please -

MR. JOHNSON: Might I do this --

THE COURT: No, no, we will have to proceed according to the law. I am going to sustain the objection.

MR. JOHNSON: May we approach the bench?

THE COURT: Yes, but do not let us have too many bench conferences.

(At the bench:)

MR. JOHNSON: Your Honor please. It is my recollection, I may be wrong, I am not positive, but I think Your Honor restricted me from asking Mr. Antonelli about this conversation.

MR. FLANNERY: He is talking so loud the jury can hear him.

THE COURT: I think this whole matter is irrelevant and hearsay.

(Following bench conference:)

MR. JOHNSON: Your witness.

CROSS-EXAMINATION

BY MR. FLANNERY:

Q. Now directing your attention to August 6, 1957, you testified that you went to this defendant's home at 10:30 P. M. ? A. Yes.
269 Q. You didn't see him there, did you? A. No.

Q. And you had no idea where he was during the evening hours of that day, had you? A. No.

MR. FLANNERY: That is all.

REDIRECT EXAMINATION

BY MR. JOHNSON:

Q. You say you have no idea. What do you mean you have no idea? A. I can't swear that I saw him because I didn't.

Q. That wasn't the question asked. Mr. Flannery asked you, have you got any idea where he was? Can you give us the benefit of any ideas you might have?

MR. FLANNERY: I object to that.

THE COURT: Objection sustained.

MR. JOHNSON: May I move that this question and answer as to whether he had be stricken?

RECROSS-EXAMINATION

BY MR. FLANNERY:

Q. You don't know of your own personal knowledge where he was the evening of August 6, 1957, do you?

MR. JOHNSON: I object to that your Honor.

THE COURT: Objection overruled.

Do you understand the question?

270 I will ask the reporter to read it.

(Reporter read pending question.)

THE WITNESS: I can only answer that and say it this way: I don't know exactly what they are asking of me.

THE COURT: Mr. Flannery, he testified that he did not see his brother.

BY MR. FLANNERY:

Q. You didn't see him that evening? Is that right?

MR. JOHNSON: Your Honor please, he testified as to that.

THE COURT: Just a moment.

MR. FLANNERY: I am merely emphasizing it on cross-examination which I have a right to do. Answer the question.

THE WITNESS: What is the question?

THE COURT: You may answer the question. Did you see your brother that evening?

THE WITNESS: No.

* * * * *

284 JAMES MCQUAIN

was called as a witness for defendant and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. JOHNSON:

Q. Will you state your name? A. James McQuain.

Q. Do you know the defendant, Clayborne Bynum? A. Yes, I do.

Q. Where does he live? A. 413 Fiftieth Street, Northeast.

Q. Are you related to him? A. No.

Q. Directing your attention to some time this summer, in the early part of August, did you have an occasion to go anywhere with Clayborne Bynum? A. Yes, I did.

Q. Do you recall the date, of your own knowledge? A. No.

Q. Do you know the approximate time you made this trip with Clayborne Bynum? A. No, I don't know the time.

Q. Can you tell whether it was in the evening or morning? A. It was in the evening.

285 Q. Where did you go? A. To the pool room.

Q. What pool room? A. The pool room at the foot of Grant Street and Fiftieth.

Q. MR. JOHNSON: You will have to keep your voice up.

Q. What did you go with Clayborne Bynum on one evening in August 1957? A. We went to play pool.

Q. You went to play pool? A. Yes.

Q. What pool room did you go to? A. I don't know the name of the pool room but it was on Grant Street.

Q. Where? A. Grant Street.

Q. At what address on Grant Street? A. I don't know that.

Q. Do you know what part of the block it was? A. It was between Fiftieth and Forty-Ninth Street on Grant.

Q. Is that in Northeast? A. Northeast.

Q. Do you know who the proprietor of that pool room was? A. It used to be a lady but I haven't seen her for quite some time.

286 Q. How long did you play pool with Clayborne Bynum that evening?

A. We played about two hours, I guess.

MR. JOHNSON: That is all.

MR. FLANNERY: No questions.

THE COURT: You may step down.

(Witness left stand.)

THE COURT: Do both sides rest?

MR. JOHNSON: Yes, sir.

MR. FLANNERY: Yes, sir.

THE COURT: We will take our mid-afternoon recess a little earlier than we usually do at this time and then you may proceed to sum up.

THE MARSHAL: This Honorable Court stands recessed for ten minutes.

AFTER RECESS:

THE COURT: Before you commence summing up there is an observation that I want to make to counsel if they will come to the bench.

(At the bench:)

THE COURT: I am sure that what I am going to say is unnecessary but I am going to say it in the interest, perhaps, of excessive caution, but something was said in open court yesterday about a lie detector test. Of course, there must not be anything said about it in summing up.

(Following bench conference:)

* * * * * * * * *

287 MR. JOHNSON: He said he had been framed. I do not think anybody has tried to frame him. I do think this true, that somebody has made an error along the line, somewhere along the line of this trial, for it seems as though the evidence as produced by the prosecution does not fit. It isn't quite up to scratch! For some reason or another, and I will give you an idea as it looks to me as to what occurred to prove that it isn't. The testimony of Mr. Good, and I know he gave the same testimony when he made his first complaint to the police officer, there were two things apparent. First, there was a kidnapping involved and evidently a trip into Maryland, across the state line. I do not suppose there is any

citizen in the United States who hasn't heard of the Lindbergh case -

MR. FLANNERY: Your Honor, I object to this form of argument.

THE COURT: Just a moment. Will counsel come to the bench?

(At the bench:)

THE COURT: Mr. Flannery what are you objecting to?

MR. FLANNERY: Obviously Mr. Johnson is going to make some criticism because this defendant was not indicted for kidnapping and he is going to say, I am sure, that the FBI did not do a thorough job of investigation in this case. He said this man had been taken across the
288 state line.

THE COURT: There is no evidence he was driven across the state line.

MR. JOHNSON: Your Honor, he testified he went to a gas station and they were all in Maryland.

MR. FLANNERY: He did not. He was blindfolded in the back of the car.

THE COURT: I personally do not think it makes any difference, Mr. Flannery. He has a right to criticize any investigation, whether it be an Agent of the Bureau of Federal Investigation, or whoever it is, he is within his rights. I am going to overrule the objection.

MR. JOHNSON: Thank you.

THE COURT: I always take the position that counsel has the right to make such arguments and such comments as he chooses so long as he does not mis-state the record or introduce something that is not in the record. I do not have the right to censure any cogency --

MR. JOHNSON: Now that the defendant had been taken into Maryland.

THE COURT: You know I was somewhat under the impression too that they drove around quite a bit, and the man being so close to the Maryland line, that the car might have been driven across the state line.
289 MR. FLANNERY: It might have been but nobody knows.

THE COURT: I think there is insufficient evidence that he was driven across the state line. Before you proceed, Mr. Johnson, in order

to prevent any possible misunderstanding, there is not sufficient evidence that the defendant was driven across the state line while he was a prisoner of the person who committed the robbery. There might be a strong inference that he was since the robbery occurred near the Maryland line but apparently Mr. Good, himself, was not sure where he was driven and the Lindbergh Act does not apply except when the kidnapped person was carried across the state line. The Lindbergh Act does not apply here.

(Following bench conference:)

* * * * * * * * *

MR. JOHNSON: However, let us examine it from this point of view, if possible, because of this investigation. If we had an investigation from the FBI in this case would we have had the print of that finger on the back of that mirror? Or, wouldn't you have been more satisfied with this evidence as it is produced if you had had the print on the back of the mirror? Wouldn't that have been very, very cogent evidence?

MR. FLANNERY: Your Honor, I think this is highly improper. There is no evidence in this case that if the FBI had investigated this matter that they would have proceeded in a manner other than that of the Police Department.

290 THE COURT: There is no basis for this statement. Of course, you have a perfect right, if you wish, to criticize any government official but you may not make factual statements that are not supported by the record. You are within your legal rights if you want to criticize but any factual statement not supported by the record is erroneous. The objection is sustained.

* * * * * * * *

* * * * *

291 PROCEEDINGS

February 14, 1958

THE COURT: Ladies and gentlemen of the Jury, the defendant, Clayborne Bynum, is on trial on a charge of robbery, in that on or about August the 6th he robbed one Edward N. Good of an automobile and of $131, or thereabouts, in money.

It now becomes your duty to determine whether the defendant is guilty or not guilty of the charge of which he is being tried. While the trial has taken a little time, and as often happens some extraneous matters have crept in in the course of the trial, the issue for you to determine is a simple one, namely, did the defendant commit the crime with which he is charged. Everything else is extraneous and must be laid to one side. Your decision must be reached solely on the evidence introduced at this trial. You must reach your conclusion calmly, deliberately, and impartially without any feeling or emotion, without any sympathy on the one hand or anger on the other, or any other feeling or emotion.

You must not be swayed by oratory or eloquence, but you must decide the case solely on the evidence, reaching your decision objectively, and in accordance with the instructions on the law that the Court is about to give you.

As you have already been informed, it is the function of the Court, that is, it is my function and my duty to instruct the Jury as to the rules
292 of law that must govern the disposition of this case. You ladies and gentlemen of the Jury are bound and obligated to take the law from the Court and to follow the Court's instructions as to the law.

On the other hand, it is your function, ladies and gentlemen of the Jury, to decide the facts. You are the sole judges of the facts, and you must decide the facts on the basis of the evidence introduced at this trial and in accordance with the rules of law that the Court is about to lay down for you.

Now, the Court has still another function to perform and that is to summarize and discuss the evidence and comment on the facts and on the evidence to the extent to which the Court deems it desirable to do so.

This is done in order to aid and assist the Jury in arriving at its decision, and solely for that purpose.

The Court's discussion of the facts and of the evidence, and the Court's comments on the facts and on the evidence are not binding on you, and you need attach to them only such weight as you deem wise and proper, and only to the extent to which you may deem them helpful. If your recollection of the evidence, or your understanding of the evidence in any particular differs from the Court's recollection or the Court's understanding, then it is your recollection and your understanding that must prevail because, I repeat, you are the sole and final judges of the facts.

293 My instructions are binding on you only as to the law. Some of the lawbooks say the Judge instructs the Jury as to the law and advises the Jury as to the facts. I shall begin by summarizing a few general basic principles of law that are applicable to all criminal cases, including of course this one.

First, the fact that a defendant has been indicted and is charged with a crime is not in itself to be taken as an indication of guilt, because the indictment is merely the procedure and the machinery by which a defendant is brought before the Court and is placed on trial.

Second, every defendant in a criminal case is presumed to be innocent. This presumption of innocence attaches to him throughout the trial.

Third, the burden of proof is on the Government to prove the defendant's guilt beyond a reasonable doubt. Unless the Government sustains the burden and proves beyond a reasonable doubt that the defendant has committed every element of the offense charged, the Jury must find him not guilty.

Now, I repeat, the burden of proof on the Government is to prove the defendant's guilt beyond a reasonable doubt. That does not mean beyond all doubt whatsoever. It means proof to a moral certainty and not necessarily proof to an absolute or mathematical certainty.

294 By "a reasonable doubt", as its very name implies, is meant a doubt based on reason and not just some whimsical speculation or capricious conjecture. What is meant by, "proof beyond a reasonable doubt", can be explained very simply. Proof beyond a reasonable doubt means this: If, after an impartial consideration of all the evidence you can say to yourself that you are not satisfied of the defendant's guilt, then you have a reasonable doubt. But, on the other hand, if after such impartial comparison and consideration of all the evidence you can truthfully and candidly say to yourself that you have an abiding conviction of the defendant's guilt, such as you would be willing to act upon in the more weighty and important matters relating to your own affairs, then you have no reasonable doubt.

In other words, proof beyond a reasonable doubt is such proof as will result in an abiding conviction of the defendant's guilt on your part. Such a conviction that you would be willing to act upon in the more weighty and important matters relating to your own affairs.

In determining whether the Government has established a charge against the defendant, you will consider and weigh the testimony of all the witnesses who have testified before you, as well as all the circumstances concerning which testimony has been introduced. Circumstances cast very often an illuminating light on oral testimony. In fact, there may be occasions on which circumstances are even more weighty than the

295 oral testimony.

You are the sole judges of the credibility of witnesses. In other words, it is for you to determine whether to believe any witness and the extent to which any witness should be credited. In case there is any conflict in the testimony, it is your function to resolve the conflict and to determine where the truth lies. In reaching a conclusion as to the credibility of any witness, that is, as to whether you should believe the witness or not, and in weighing the testimony of any witness, you have a right to consider any matter that seems to you to have a bearing on the subject.

For example, you have a right to consider the demeanor and behavior of the witness on the witness stand, the witness' manner of testifying, whether the witness impressed you as a truth-telling individual, whether the witness has any motive for not telling the truth, and whether the witness has any interest in the outcome of this case. If you find that any witness wilfully testified falsely as to any material fact concerning which the witness could not reasonably have been mistaken, you are then at liberty, if you deem it wise to do so, to disregard the entire testimony of that witness, or any part of that witness' testimony.

One of the witnesses was the defendant himself. In the course of his testimony it was brought out that he has a criminal record, having been convicted of larceny of an automobile in another jurisdiction before he came to Washington. Now, the law admits in evidence the criminal
296 record of any witness, be that witness the defendant or any one else. Now, the reason the criminal record is admitted in evidence is this: Of course the criminal record has no bearing on the question of the guilt or innocence of the charge of which the defendant is being tried. That charge has to be established independently by evidence, but the criminal record of a witness is admitted in evidence solely for the purpose of assisting the Jury in determining whether or not to believe the witness. Any fact that may tend to show that the witness may not be a truthtelling individual is admissible in respect to that witness, be that witness a defendant or any one else. Consequently, you have a right to consider the defendant's criminal record, not as bearing on the question of guilt or innocence, but for the purpose and as a help in determining whether he was a trustworthy witness and should be believed when he took the witness stand.

You have a right, it is in your discretion, if you see fit to do so, to reach the conclusion that a person who has a criminal record is not entitled to the same degree of belief when he testifies as a person whose record is unblemished.

This brings me to the specific charge involved in this case, namely, robbery. Robbery is defined very simply in the District of Columbia Code, and the pertinent parts of the definition read as follows:

297 "Whoever, by force or violence, whether against resistance or by sudden or stealthy seizure, or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery."

It is the contention of the Government, and the Government introduced evidence tending to show, that on the evening of August the 6th, Edward N. Good, who was then the Assistant Manager of a Safeway store, closed the store and drove home, his home being at 5311 Third Street, in the District of Columbia. He was carrying on his person his pay amounting to $84, and a $50 bill in addition to that, and he was also carrying a load of groceries. As he was approaching his home he was held up, to use the colloquial expression, by a man who pointed a gun at him. He was told to get into a car used by the man who committed the holdup; he was struck over the head and was shoved into the front seat, later being transferred to the back seat. His money was taken from him.

There were two persons participating in the robbery. One of the participants drove the car in which Mr. Good was being carried away, and the other man entered Mr. Good's car and drove Mr. Good's car away. The testimony introduced by the Government further indicates that an effort was made to obtain from Mr. Good the combination to the safe in the Safeway store, but he declined to give up the combination, and after about an hour and a half or two he was liberated by his captors.

298 Thus, according to Mr. Good's testimony, there were two persons who participated in the robbery. Now, the law is that if several persons act jointly or in concert, each performing a part that contributes to the commission of the offense, and all the parts performed by the several persons result in a commission of the offense, all are equally guilty. In other words, for example, by way of illustration, if one man holds up

the victim of the robbery, and the other is driving the car used in the commission of the robbery, both are equally guilty of the robbery.

Now, before summarizing the evidence that the Government introduced in support of its contention that the defendant was one of the two perpetrators of this robbery, I want to spend a few moments discussing with you the theory of evidence generally.

In criminal cases there are two types of evidence; one type is known as direct evidence, the other type is known as circumstantial evidence. Now, the difference between the two types of evidence is this: By direct evidence is meant evidence of eye witnesses who saw the act perpetrated and can identify the perpetrator. Now, of course, in a great many criminal cases the direct evidence is not available because, naturally, the tendency of criminals is to act in secret and
299 not in front of witnesses if they can avoid it. Therefore, if the law required direct evidence many criminals would go unwhipped of justice.

The second type of evidence is circumstantial evidence. It consists of circumstances from which a defendant's guilt may be inferred by the Jury.

Now, let me give you an illustration of the difference between direct and circumstantial evidence. Suppose, for instance, the accused were charged with breaking and entering into a house through a window and a passerby testifies that he saw and identifies the defendant as the person who entered the house through the window. That would be direct evidence. On the other hand, if nobody saw the defendant enter the place, but if the fingerprints of the accused were found on the window sill or on the window sash, such evidence would be circumstantial evidence.

The presence of the fingerprints would prove that the accused had his hand on the windowsill or window sash. The law permits conviction of a criminal offense on circumstantial evidence alone. All the Jury has to be satisfied of is that they find a defendant guilty beyond a reasonable doubt.

Now, it can not be said that direct or circumstantial evidence is better than the other. It can not be said, for example, that direct evidence is more reliable or stronger than circumstantial evidence. For example, an eye witness may make a mistake in identifying the person
300 whom he thinks he saw. That has happened. His memory may be inaccurate, power of observation may have been limited, or he may be intentionally fabricating a story. On the other hand, if the circumstantial evidence is sufficiently strong, it may be even more convincing than direct evidence, if the circumstances are such as irresistably to lead to a definite conclusion.

Now, let me pass on to the evidence which the Government introduced to prove that the defendant was one of the two participants in this robbery. Fortunately, Mr. Good's assistant, Mrs. Mannix, was able to get the number of the license tag on the automobile of the perpetrators of the crime. The police traced this license tag number, and evidence was introduced to the effect that the car in question was registered in the name of the defendant. That is the first item of evidence on this point that the Government introduced.

The second item is this: Mr. Good testified that when he was held up and made to enter the car used by the persons who committed the robbery, he was carrying his groceries, among them a bag of sugar, which he spilled on the floor of the automobile. Considerable particles of sugar were later found on the floor of the defendant's car.

Now, as I understand the defendant's position, the defendant admits that the car was his, but he denies that he had any participation in or any knowledge of the robbery. His contention is that on the evening
301 on which the robbery was committed he lent the automobile to one Jones, and he doesn't know how Jones used the car. I presume that the inference that the defendant would have you draw is that Jones was one of the participants of the robbery. It may well be that he was. He is not on trial now, and the evidence indicates he is a fugitive from justice. If he should be apprehended, and if the Grand Jury should indict him, he would be tried at a later date. But the testimony of Mr. Good is, and it has not

been contradicted, that there were two participants in the robbery, and the Government claims that irrespective of whether Jones was or was not the other participant that this defendant, who is now on trial, was one of the two participants.

Now, in support of his denial that he participated in the robbery, the defendant testified that he was at home during the early part of the evening and that then he left home and went to a poolroom in the neighborhood at about 9:30 p. m. and stayed there until about 11:40 p. m. or so. It is for you to determine where the truth lies and what the fact was.

No witness was called on behalf of the defendant to corroborate his contention that after he left home about 9:30 he went and stayed at this poolroom for a considerable period. Mr. Good's testimony was that the robbery took place between 9:00 and 10:00 o'clock, and the defendant admits he left home about 9:30, but he says he went to this poolroom.

302 Now, finally, and this is the principal item of evidence on which the Government relies, is that the defendant's fingerprint was found on the rearvision mirror of Mr. Good's car. The representatives of the police department describe in detail how they examined Mr. Good's car for fingerprints, how a latent, that is, a hidden fingerprint was located on the rearvision mirror of Mr. Good's car; how it was compared with the defendant's fingerprint by police department expert, and the fact that the two fingerprints were the same.

The expert testimony comparing the two fingerprints was uncontradicted, and the expert is a man who, according to his testimony, had received his training in the Federal Bureau of Investigation.

The defendant says, to use his own language, that he was "framed". It is for you to determine where the truth lies and what the fact was.

Now, I repeat what I said to you at the opening of my remarks, that what I have said about the evidence is not binding on you; only my instructions on the law are binding. So far as the evidence is concerned, you must remember that you are the final judges of the facts, and you must make your own decision. That is your function and your responsibility.

In this case, ladies and gentlemen of the Jury, your verdict should be either guilty or not guilty. And of course as you are well aware your verdict must be reached by unanimous vote. Are there any suggestions
303 or objections?

MR. FLANNERY: No, your Honor.

MR. JOHNSON: May we approach the bench?

(Conference at bench:)

MR. JOHNSON: If your Honor please, with regard to the conviction, the record shows that he was about fifteen or sixteen when that offense occurred, and he was a juvenile, and I think the facts and circumstances of his conviction can be considered along that line.

THE COURT: Well, that is for the jury. He testified to the facts and circumstances. The rulings of the Court of Appeals admit that type of evidence as to the circumstances of the conviction and that is the reason I admitted it.

MR. JOHNSON: I was wondering though, because your Honor spoke about, and I don't think there was any mention of the fact that he was a juvenile.

THE COURT: Oh, I shan't mention that. I do not know what the juvenile law of North Carolina is. He may not be considered a juvenile there.

MR. JOHNSON: He was fifteen. There is nothing --

MR. FLANNERY: The most vicious crimes are committed by juveniles.

THE COURT: We are too tender with juveniles. That is one of the contributing causes of the crime rate.

MR. JOHNSON: And during your Honor's comments on the signi-
304 ficance of circumstantial evidence, your Honor did not state that circumstances might be such that an inference of innocence might come from them also.

THE COURT: I said they might lead to unerring, definite conclusions; I did not indicate what the conclusion was.

MR. JOHNSON: I think your Honor's specific words were, "You might have an inference of guilt."

THE COURT: I am not going to change that.

MR. JOHNSON: Very well. But in those particulars, and in the particular about a reasonable doubt may arise out of a lack of evidence also, instead of from the evidence alone.

THE COURT: No, reasonable doubt doesn't arise out of lack of evidence. Reasonable doubt arises if the evidence is not sufficient to make proof beyond a reasonable doubt. I do not think I will enlarge on that.

MR. JOHNSON: All right, sir.

(Conference at bench concluded.)

THE COURT: Ladies and gentlemen of the Jury. The twelve regular jurors may retire. Upon reaching the jury room you will first select a foreman from amongst yourselves who will preside over your deliberations and as your chairman, and then you will proceed to reach a verdict.

The twelve regular jurors may follow the marshal, and the two alternate jurors may retain your seats for a moment.

305 (Whereupon at 10:45 o'clock A. M. the jury retired to the jury room to deliberate.)

* * * *

(The Jury returned at 11:58 a. m. with the following verdict)

THE DEPUTY CLERK: Who is the foreman, please?

THE FOREMAN: (Number Six Juror) I am.

THE DEPUTY CLERK: Has the Jury agreed upon a verdict?

THE FOREMAN: We have.

THE DEPUTY CLERK: What say you as to the Defendant Clayborne Bynum?

THE FOREMAN: Guilty.

THE DEPUTY CLERK: Members of the Jury, your Foreman says you find the Defendant Clayborne Bynum guilty as charged and that is your verdict so say you each and all?

THE COURT: Ladies and gentlemen of the Jury, the Court wishes to thank you for the time and the attention that you have given to this case. I think I will make final disposition at this time.

The Court will be glad to hear counsel on the question of sentence.

MR. JOHNSON: If your Honor please, I have no particular representation to make about the defendant except this, that since this case has gone to the Jury some additional information that I will bring to your
306 Honor's attention has come to my attention, but as far as the offense is concerned, from my client's communications to me, he has informed me that he did not commit this offense; he has reaffirmed his position with me.

I have gone over it thoroughly with him, and with reference to the sentence, if any that your Honor will impose upon him, I can only tell your Honor that the circumstances are such if he is guilty would be that he would be guilty of a serious offense. If he is not guilty, actually not guilty, whatever sentence your Honor imposes on him would be to his way of thinking a consummation of what he considers in his own way a travesty of justice.

As between those two points of view, your Honor I know is bound by the Jury's verdict. From the defendant's point of view he is bound by it, at least at this aspect of the case. I don't know what representations to make to your Honor with regard to a sentence. I have no way of determining what sentence I would give if I were in the Court's position, and from my point of view any sentence that is given to the defendant would be a grevious burden upon a man that I believe to be not guilty.

THE COURT: Is there anything that you would like to say?

THE DEFENDANT: I am not guilty; that is all.

307 THE COURT: Now, the Jury has found the defendant guilty and that verdict is binding on the Court, of course, but besides that the Court agrees with the Jury. The Court has no doubt of the defendant's guilt, because if there is one type of evidence that never fails it is the fingerprint evidence, and his fingerprint was found on the victim's car.

Now, all robberies are very vicious types of crimes, but this is the most vicious, one of the most vicious types of robberies that has ever come before me, because in addition to robbing this gentleman who, by the way, has had the same job for 37 years, the victim of the crime was driven around town for almost two hours in an effort to extract from him the combination to the safe of the store of which the victim was assistant manager. The victim must have had a night of terror, and the Court feels that only the maximum sentence would fit this offense, in fact, the Court is of the opinion that the maximum is insufficient, but the Court can not impose any more than the maximum that the law allows.

Clayborne Bynum, it is the judgment of this Court that you be imprisoned in an institution to be designated by the Attorney General of the United States for a term of not less than five years and not more than fifteen years.

* * * * *

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BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14403

CLAYBORNE BYNUM, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

OLIVER GASCH,
United States Attorney.

CARL W. BELCHER,
THOMAS A. FLANNERY,
NATHAN J. PAULSON,
Assistant United States Attorneys.

United States Court of Appeals
For the
District of Columbia Circuit

FILED JUN - 6 1958

Joseph W. Stewart
CLERK

QUESTIONS PRESENTED

1. Where the North Carolina Statutes define an adult as a person over the age of sixteen years and appellant was convicted in that state of the crime of larceny of an automobile when seventeen years old, did the trial court commit error by permitting the prosecutor to interrogate appellant as to his conviction for the purpose of attacking his credibility?

2. Did appellant receive a fair trial?

3. Was there probable cause for appellant's arrest without warrant? If the arrest was illegal and his fingerprints taken in the normal course of police booking procedure, does reversible error appear upon the receipt of the fingerprint evidence when the District Court, at the trial, could properly have ordered the taking of the fingerprint of appellant for the purpose of identification?

4. Was appellant entitled to alleged descriptions given to police by a witness who testified that he could not identify the criminal and did he receive that which he sought?

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14403

CLAYBORNE BYNUM, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

On October 7, 1957, there was filed in the District Court an indictment charging appellant with violation of 22 D. C. C. § 2901 [1] (R. 313). On October 11, 1957, appellant entered a plea of not guilty and advised the court that he would obtain counsel (R. 314). On October 18, 1957, retained counsel entered an appearance. On January 9, 1958, appellant filed a letter requesting counsel be appointed by the court because his retained lawyer had not put forth any effort in his behalf. On January 21, 1958, appellant, pro se, filed a motion to suppress evidence alleging an illegal search and seizure and illegal detention. On February 3, 1958, appellant, through his retained counsel, filed a motion for discovery and inspection. On February 7, 1958, the motion to suppress was denied after argument by counsel and the motion for inspection was withdrawn. On February 14, 1958, appellant was found guilty as

[1] Robbery by force and violence.

charged by a jury (R. 319). On the same day, appellant was sentenced to a term of imprisonment of from five years to fifteen years (R. 320). Notice of appeal was filed and the District Court permitted appellant to proceed on appeal without prepayment of costs.

Edward N. Good testified that he resided in the District of Columbia on August 6, 1957 (R. 1); that he was assistant manager of a Safeway store located in Maryland (R. 3); that on the aforementioned day he closed the store at 9 P. M. after putting the day's receipts in the store safe (R. 3); that he locked the store and, turned out the lights; that before he entered his car he had a conversation with one of his employees (Jenny Mannix) after which he proceeded home arriving there between 9:40 and 10 P. M. (R. 5); that he had $85 on his person and was driving a 1955 Mercury automobile (R. 6); that while locking his car a light-skinned colored person engaged him in conversation and then "stuck a gun in [him]" (R. 8); that another car then pulled over and after being struck, he was ordered into the second car (R. 9); that his head and shirt were bloody and his glasses were broken (R. 10); that they caused him to lie flat in the rear of the car at the same time being blindfolded (R. 11); that they took his car keys and one of the men took his car (R. 12); that they took his money (R. 12); that they told him that they wanted the money in the safe at the store (R. 13); that they threatened him (R. 14); stopped for gas (R. 14); and then dropped him off from which place he found his own car and immediately proceeded home and called the police (R. 18). He testified that he could not identify appellant because his glasses had been knocked off his nose and had been broken (R. 19) but that on August 9, 1957, at police headquarters he identified a car as the one he had been kept prisoner in (R. 20) by the upholstering and the sugar in the back which he had put there (R. 20, 21). His testimony did not vary on cross-examination.

Jenny Mannix testified that she was a clerk in the Safeway store and when she left the store late that night she saw a tall colored man with a T shirt outside the store looking in (R. 42, 43); that the man then went over to a parked car which was in a no-parking zone (R. 43); that she then left but returned and

saw the same car parked near the door of the store (R. 43); that the car contained two persons (R. 43); that she could not identify either but she took down the license plate number which was JK8150 Maryland (R. 45); that she gave the number to the police (R. 46). Her testimony was not varied by cross-examination (R. 46–49).

Vincent Antonelli testified that he was a member of the Metropolitan Police Department assigned to the robbery squad; that he responded to the complaining witness' call on August 7, 1957, and as a result caused teletypes to be sent out concerning the robbery (R. 52). He further testified that as a result of reliable information furnished him regarding the Maryland license tag used in the robbery he communicated with the Maryland State Police and learned that the automobile was listed to appellant whose address was given to be on River Road in Bethesda, Maryland. He proceeded to that address and found it to be an ice cream and soft drink place (not a residence) and that appellant had been employed there at one time (R. 143). He was then furnished with an address in the 400 block of 50th Street NE., to which he proceeded and "scouted the immediate area for the car." Not being able to locate it, he checked the directory and under appellant's name found his address to be the Dunbar Hotel in the District of Columbia (R. 143). Upon proceeding there he learned that appellant no longer lived there (R. 144), having moved two months previously (R. 144). He then returned to the 50th Street area but again met with no success (R. 144). He returned to the robbery squad immediately and there typed out an interstate teletype to local and interstate police (R. 144).

Walter Chesley testified that he was a crane operator for the Metropolitan Police Department and that on August 7, 1957, at 12:50 A. M., he took the complaining witness' car to police headquarters (R. 57, 58).

John P. Logan testified that he was a member of the Metropolitan Police Department; that after he was notified of the teletype regarding appellant's car he saw the same being driven on the streets of the District of Columbia on August 9, 1957; that he pursued it, halted it and took the car and driver to the 14th Precinct (R. 61).

Harry Noone testified that he was a member of the Metropolitan Police Department; appellant called the precinct and "wanted to find out what his brother was arrested for" (R. 64). He was told to come to the station house for that information. Upon arrival at 4:30 P. M., appellant was arrested and admitted that he owned the car (R. 67). He was then turned over to the robbery squad (R. 64).

John B. Singleton testified that he was a member of the Metropolitan Police Department assigned to the identification bureau; that he took the appellant's fingerprints when being booked (R. 70, 71) and identified them in court.

Herbert C. Young testified that as a member of the robbery squad of the Metropolitan Police Department, he examined the upholstery of the 1950 Oldsmobile bearing license tag No. JK8150 Md. and found it to be torn "pretty badly" (R. 77). He also found a white substance on the rear floor which he delivered to the Federal Bureau of Investigation for analysis (R. 77).

Roy H. Jevons, a F. B. I. microscopist, testified that the white substance was common table sugar (R. 81).

Edward Joseph Dion, after qualifying as a fingerprint expert with the Metropolitan Police Department and the F. B. I., testified that on August 7, 1957, he examined the complaining witness' car and "lifted" some prints off of the rear view mirror (R. 87, 88); that he compared one of the prints with that of the prints taken of appellant when booked and found them to be the same (R. 97). His testimony was not shaken by cross-examination (R. 109).

After the government rested its case appellant moved for judgment of acquittal (R. 139). This was denied.

Appellant testified in his own behalf setting up the defense of alibi and the fact that he had loaned the car to a friend. He also contended that he was "framed" (R. 225).

Just prior to cross-examination, at a bench conference, the question of a prior conviction of appellant was raised by the prosecutor (R. 203, 204).[2] Appellant would have been seventeen years and two months of age when convicted of larceny.

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[2] The F. B. I. report which prompted the prosecutor to confer with opposing counsel and the court disclosed that appellant had been sentenced to a term of twelve months in the state penitentiary in North Carolina.

When the court advised counsel that he would permit interrogation appellant's counsel then decided to question appellant regarding the conviction on direct examination. He did not, however, elicit from him any testimony that appellant was under the jurisdiction of a juvenile court. On cross-examination, appellant admitted that he had been convicted in North Carolina of the offense of larceny of an automobile (R. 207–208).

Several other witnesses testified in his behalf.

STATUTES INVOLVED

Title 22, District of Columbia Code, Section 2901 provides:

> Whoever by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery and any person convicted thereof shall suffer imprisonment for not less than six months nor more than fifteen years.

Constitution of the United States of America, Article IV, provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

General Statutes—North Carolina—110–23 provides in part:

> The term "Court" when used in this article without modification shall refer to the juvenile courts to be established as herein provided.
>
> * * * * *
>
> The term "child" shall mean any minor less than sixteen years of age. The term adult shall mean any person sixteen years of age or over (1919, s. 97, s. 3 & C. S., s 5041).

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General Statutes—North Carolina—14–1 provides:

> *Felonies and misdemeanors defined.*—A felony is a crime which is or may be punishable by either death or imprisonment in the State's prison. Any other crime is a misdemeanor (1891, c. 205, s 1; Rev., s 3291; C. C., s. 4171).

SUMMARY OF ARGUMENT

Appellant, when over the age of seventeen, was convicted in North Carolina for the crime of larceny of an automobile. Under the laws of that state he was not a juvenile, and no evidence was submitted disclosing that he had been tried in a juvenile court. His credibility could therefore be impeached by interrogation as to that conviction.

The record discloses that appellant received a fair trial and was not hampered nor hindered by the trial judge during the proceedings. The Judge's instructions were complete and fair.

There was probable cause for the arrest of appellant without a warrant because the police had reasonable grounds to believe that his car had been used in the commission of a heinous crime and, with no fixed address in violation of motor vehicle regulations, he was residing in the District of Columbia at an unknown address, using an automobile with Maryland license plates which would make it almost impossible to find him because of his suspicious actions in moving from place to place so often.

Assuming arguendo, that the arrest was illegal, the fingerprints taken in the normal course of police procedure in booking appellant and later compared with the fingerprint recovered at the scene of the crime were properly received in evidence. Appellant cites no authority which shows the Fourth Amendment of the Constitution provides for the suppression of fingerprints. The courts have consistently rejected a comparable argument that the Fifth Amendment prohibits the use of the body without consent as evidence. Moreover, the connection between the fingerprints taken upon arrest and the fingerprints taken at the scene of the crime was so attenuated as to dissipate any taint.

The descriptions sought by appellant were received by him during the trial. Apparently he was satisfied with them for after the receipt thereof, he did not cross examine regarding them, and, thereafter, evidenced no dissatisfaction.

ARGUMENT

I

Appellant was not a juvenile, when he was convicted of larceny, according to the General Statutes of North Carolina

For the purpose of criminal jurisdiction, the General Statutes of North Carolina set forth the age limits of what constitutes an adult and a minor. Section 110–23 provides that a minor is a person below the age of sixteen years. All persons above that age are adults. Section 110–29 contains a provision similar to that of the District of Columbia Code, 11–914 whereby in cases of felonies the court may waive jurisdiction and order the child held for trial under a court which would have jurisdiction of such offense if committed by an adult. Section 14–1 of the same General Statutes provides that a felony is a crime which is or may be punishable by either death or imprisonment in the State's prison.

Pursuant to the laws of the State of North Carolina, *State* v. *Burnett*, 179 N. C. 735, 102 S. E. 711 (1920), held that under the waiver provision a minor may be tried as an adult. Assuming *arguendo*, that appellant had been a minor at the time of his conviction, the F. B. I. report, in possession of the prosecutor was sufficient to warrant interrogation regarding the conviction.[3]

In any event, appellant, on direct examination, elicited some facts regarding the crime but submitted no testimony or proof that appellant had been tried in a juvenile court as a minor. Appellant, on direct examination, testified that his date of birth was April 24, 1936. The date of conviction for the felony was June 8, 1953. Being slightly over the age of seventeen and well over the age of sixteen, it is clear that under

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[3] It disclosed that appellant was sentenced to States Prison for twelve months for larceny of an automobile.

the laws of North Carolina, appellant was not a minor and could not have been tried in juvenile court.

It follows therefore that no error was committed by permitting appellant's credibility to be impeached by disclosure of the prior conviction.

II

The arrest was based upon probable cause. However, assuming arguendo, that the arrest was invalid, the trial court committed no error by permitting fingerprints, taken after the arrest, to be compared with fingerprints left at the scene of the crime

The requirement as to the existence of probable cause does not mean that the police officer must at the time of arrest possess legal evidence sufficient for a conviction. *Washington* v. *United States,* 92 U. S. App. D. C. 31, 202 F. 2d 214 (1953); *Brinegar* v. *United States,* 338 U. S. 160, 174–176, 93 L. Ed. 1879, 69 S. Ct. 1302 (1949). As was stated in *Husty* v. *United States,* 282 U. S. 694, 700–701, 75 L. Ed. 629, 51 S. Ct. 240 (1931):

> To show probable cause it is not necessary that the arresting officer should have had before him legal evidence of the suspected illegal act. [Citations omitted.]

In the Brinegar case, supra, the court stated:

> In dealing with probable cause, however, as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everday life on which reasonable and prudent men, not legal technicians, act. The standard proof is accordingly correlative to what must be proved.
>
> "The substance of all the definitions" of probable cause "is a reasonable ground for belief of guilt." *McCarthy* v. *De Armit,* 99 Pa. St. 63, 69, quoted with approval in the *Carroll opinion.* 267 U. S. at 161.
>
> * * * * * * * *
>
> (There is a) difference between what is required to prove guilt in a criminal case and what is required to show probable cause for arrest or search.

> * * * There is a large difference between the two things to be proved, as well as between the tribunals which determine them and therefore a like difference in the quanta and modes of proof required to establish them.

This Court, in *Bell* v. *United States*, —— U. S. App. D. C. ——, —— F. 2d —— (No. 13,684, decided January 23, 1958), stated:

> The Supreme Court in *Mallory, supra,* said "The police may not arrest upon *mere* suspicion." [Emphasis ours.] But suspicion on reasonable grounds is not mere suspicion. The opinions by Mr. Justice Stone and Mr. Justice Rutledge, to which we have refrred, make this amply clear. And the United States Code also makes the difference clear. Section 2236 of Title 18 provides that an officer searching a dwelling without a warrant is guilty of a misdemeanor, but is provides that the section shall not apply to an officer arresting a person "suspected on reasonable grounds of having committed a felony." And agents of the Federal Bureau of Investigation are authorized by statute to make arrests without warrant for a felony "if they have reasonable grounds to believe that the person to be arrested has committed" the felony.
>
> Reasonable grounds are determined by the circumstances. "[F]actual and practical considerations of everyday life," "facts and circumstances," "acting on facts," "the apparent facts," "in the circumstances" are some of the expressions used by the Court in the opinions from which we have quoted. The pertinent circumstances are those of the moment, the actual ones.
>
> * * * * *
>
> The sum total of the reams that have been written on the subject is that a peace officer may arrest without a warrant when he has reasonable grounds, in light of the circumstances of the moment as viewed through his eyes, for belief that a felony has been committed and that the person before him committed it. We require police officers to be reasonable; we too must be reasonable.

The facts in the case at bar clearly reflect that the police had probable cause to arrest appellant. The record shows that the police were reliably informed that an armed robbery had taken place a half hour previously; that two persons had, at that time been in an automobile illegally parked close by the store; that one of those persons had been acting suspiciously by peering into the store when it was about to close; that just before the manager of the store entered his car to go home the car heretofore mentioned drove right close to it; that an employee witnessed this and took down the license number of said car at that moment; that shortly thereafter the manager was held up in front of his home by two persons in a car; that he was threatened and struck by a pistol or pipe; that one of his assailants took his car; that he was forced to lie in the back of the assailant's car blindfolded; that he trampled down some sugar on the floor of the rear seat; that he was eventually released with this knowledge, the police then communicated with the Baltimore authorities in order to ascertain the registered owner. They were advised that appellant was the owner and were given an address which turned out to be that of an ice cream store in Bethesda, Maryland, where appellant did not reside. They were furnished with another general area addressed by the ice cream store owner but upon investigation at the latter address no trace of appellant or his car was found. They then learned of a third address (Dunbar Hotel) in the District of Columbia. They were advised there that appellant had moved therefrom some two months previously. After returning to the previous general area address and not being successful, the police returned and sent out an interstate teletype regarding the car and owner. Two days later a police officer with knowledge of the "lookout" saw appellant's car being driven in the District of Columbia. He immediately halted it and took the driver and the car to the police station. Thereafter, appellant voluntarily appeared at the police station and was arrested. Prior to the arrest the police had recovered a fingerprint from the rear mirror of the complaining witness' car.

In essence the police had before them (1) reasonable grounds to believe that the car then in their possession was

used in the commission of a heinous crime (armed robbery plus a terrifying blindfolded night ride of an older man), and (2) the owner of the car with no fixed address in violation of motor vehicle regulations.

In addition their information was that appellant owning a car with Maryland license tags was residing in the District of Columbia. With the full awareness that it might well be impossible to find appellant because of his suspicious actions in moving his residence so often we submit that not only was there probable cause to arrest appellant but that it was the police officer's duty to do so.

Appellant contends that the arrest was illegal and therefore appellant's fingerprints taken after arrest when he was booked by the police should have been suppressed. Assuming arguendo, that the arrest was illegal, we submit that his argument must fail.

An illegal arrest per se is of no significance. *Collins* v. *Frisbie*, 342 U. S. 519; *Gillars* v. *United States*, 87 U. S. App. D. C. 16, 182 F. 2d 962, 972 (1950); *Green* v. *United States*, 88 U. S. App. D. C. 249, 188 F. 2d 48 (1951); *Sheehan* v. *Huff*, 78 U. S. App. D. C. 391, 142 F. 2d 81 (1944).

The taking of fingerprints, after arrest, is part of the normal police procedure for the safeguard of society. It is done for a variety of reasons e. g., for exoneration of the innocent, for future apprehension should there be an escape, for imposition of additional sentence if required by law (drug peddlers), and for future identification when necessary. Here the fingerprints, per se, were not evidence of a crime such as illegal drugs or weapons would be.

There is no basis in the Fourth Amendment of the Constitution for the suppression of fingerprints. Appellant cites no cases to the contrary, and we have found none. The Fourth Amendment has no application to a view of the body or preservation of such view by mechanical means. Can it be said that if one is arrested illegally, brought before a police lineup and identified as the perpetrator of a crime by the victim, that such identification could be suppressed at trial? Or, that after an illegal arrest one is identified as a wanted criminal from a

police rogues gallery photograph, is such identification inadmissible in evidence? We submit not.

Fingerprints may be obtained without consent in many ways.[4] Moreover, the connection between the prints obtained by the police in the course of their normal procedure of booking an arrested person, and the prints left at the scene of the crime was remote. As noted above, the obtaining by the police of appellant's fingerprint, by itself, did not constitute incriminating evidence. Prior and subsequent police work (obtaining the print left at the scene of the crime, and the comparison of the two prints) necessary to constitute the fingerprint as evidence in this case, so attenuates any taint as to dissipate it. As this Court stated in *Gregory* v. *United States*, 97 U. S. App. D. C. 305, 231 F. 2d 258:

> Though the question is close, we think the connection between the evidence and the previous misconduct of the police is "so attenuated as to dissipate the taint."

This same rationale was set forth in *Sullivan* v. *United States*, 95 U. S. App. 78, 219 F 2d 760, 762 (1955), and *Nardone* v. *United States*, 308 U. S. 338 (1939).

A comparable argument that the Fifth Amendment prohibits use of the body as evidence without consent has been rejected consistently. As stated in *McFarland* v. *United States*, 80 U. S. App. D. C. 196, 150 F. 2d 593, 594 (1945);

> The prohibition of compelling a man in a criminal court to be witness against himself is a prohibition of the use of physical or moral compulsion to extort communication from him, not an exclusion of the body as evidence, when it may be material.[1] Out of court as well as in court, his body may be examined with or without his consent.[2]

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[1] *Holt* v. *United States*, 218 U. S. 245, 252, 253, 31 S. Ct. 2, 54 L. Ed. 1021, 20 Ann. Cas. 1138 (Holmes, J.).

[2] *Shaffer* v. *United States*, 24 App. D. C. 417, 425; *Bratcher* v. *United States*, 4 Cir., 149 F. 2d 742, certiorari denied, 65 S. Ct. 1590, Wigmore on Evidence, 3 Ed., §§ 2263, 2265.

[4] In this case there was available to the police appellant's fingerprints through his F. B. I. record, which contained his prior conviction and sentence in North Carolina State Prison. These surely could have been used for comparison and evidence.

See also *State* v. *Grayson*, 239 N. C. 453, 80 S. E. 2d 387 (1954); *Cf. Smith* v. *United States*, 187 F. 2d 192 (1950), *cert. denied*, 341 U. S. 927, 71 S. Ct. 792. It follows that in the instant case the trial judge could have ordered the taking of appellant's fingerprints in court without his consent and allowed a comparison with the evidentiary fingerprint left at the scene of the crime to be made. Assuming the arrest was illegal, appellant has no legal cause to complain.

III

Appellant received a fair trial. The court did not hamper the defense

The conduct of a trial and the orderliness of the procedure at trial and control of examination and cross-examination are matters within the discretion of the trial judge. Unless the latter abuses his discretion no error is committed. We submit that the record in the instant case does not reflect any abuse by the trial judge who many times found it necessary to admonish trial counsel but did so only outside the hearing of the jury.

Appellant is mistaken when he stated (Br., p. 5) that the trial judge made the remark that he knew of no rule against lifting a fingerprint in front of the jury. The record reflects (R. 98) that the remark was made at a bench conference.

Similarly, appellant infers that the court refused him permission to have exhibits passed to the jury during the trial although the prosecutor was not denied that privilege (Br., p. 5). The record reflects that the court directed that the marshal perform this function (R. 110).

The alleged errors referred to under T. 142, 146, 157, 158, 160, 161, 162, 165 (Br., p. 5) are, we submit, not supported by the record. In fact, during that period of the trial the judge asked counsel to approach the bench and make a tender (R. 147).

Appellant also contends (Br., p. 6), that the court erred in its charge by stating that "despite the fact that McQuaine (Tr., pp. 284, 285) testified in corroboration of Bynum's testimony about pool on August 6, in the evening" no corrobora-

tion existed. We submit that the record reflects that McQuaine's testimony did not furnish corroborating testimony regarding pool on the hour or even the date which was in issue in this trial.

None of the matters alleged by appellant to constitute error either singly or collectively constitute reversible error.

IV

Appellant received that which he sought and was satisfied with it

During the course of the trial, appellant's request for the police progress reports was properly denied. He then sought the report made by the complaining witness for the purpose of ascertaining what descriptions, if any, were given by the witness of the persons who committed the crime. Up to that time the complaining witness had stated that the man who had "stuck a gun in [him]" was kind of light-colored but "I just couldn't see because it was a dark street and the light [didn't] shine over" (R. 8). He also stated that he could not identify the persons because his glasses had been knocked off (R. 19).

Thereafter when Officer Antonelli was on the stand the court advised appellant that the prosecutor would give him the report as to the description, if any, furnished the police by the complaining witness (R. 51). The report was given to appellant who stated that he wished to see the reverse side of the sheet of paper. This was denied with the advice of the court that he could cross-examine the police officer as to any ambiguities or for any explanations. In that posture, the prosecution failed to ask the police officer for testimony regarding the description. Appellant, apparently satisfied with his efforts, never cross-examined the police officer regarding the contents of the report furnished him.

In any event, since the complaining witness could not and did not identify appellant as the perpetrator of the crime, the latter was not prejudiced by allegedly failing to receive the data referring to identification.

CONCLUSION

Wherefore, it is respectfully submitted that the judgment of the lower court be affirmed.

OLIVER GASCH,
United States Attorney.
CARL W. BELCHER,
THOMAS A. FLANNERY,
NATHAN J. PAULSON,
Assistant United States Attorneys.

U. S. GOVERNMENT PRINTING OFFICE: 1950

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals
For the
District of Columbia Circuit

FILED DEC 30 1958

Joseph W. Stewart
CLERK

No. 14403

CLAYBORNE BYNUM, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

PETITION FOR REHEARING EN BANC

Comes now the appellee, by its attorney, the United States Attorney, and moves the Court to grant rehearing in banc. The instant case is plainly one that is appropriate for such consideration.[1]

1. The decision in this case is in direct conflict with two recent decisions of this Court. The opinion, however, makes no mention of either of these precedents, and is based on a legal premise flatly contradicted by both of them.

In *Smith* v. *United States,* — U. S. App. D. C. —, 254 F. 2d 571, *cert. denied,* 357 U. S. 937 (1958), the Court held that an oral confession made by appellant following his arrest was admissible even if the arrest was illegal.

> We believe the rule to be that confessions made while a defendant is under arrest are admissible in evidence if voluntarily made and if Rule 5, Federal Rules of Criminal Procedure, is not violated, *whether the arrest was legal or illegal.* (Emphasis added.)

* * * * *

[1] The Court is authorized by statute to order rehearing in banc. 28 U. S. C. § 46 (c) (1952). It is a "necessary and useful power" in cases "appropriate for consideration by the full court". *Western Pacific R. Corp.* v. *Western Pac. R. Co.,* 345 U. S. 247, 259, 260, 262.

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> We believe that neither the arrest nor subsequent search was illegal; but, without the necessity of holding that the arrest and search were proper, we believe that the admission of the inculpatory statement was proper, and that no reason exists for the reversal of the conviction on this account.

In *Gibson* v. *United States*, 80 U. S. App. D. C. 81, 149 F. 2d 381 (1945), reaffirmed in the *Smith* case, the Court refused to reverse appellant O'Kelley's conviction despite the fact that all of the Government's evidence derived from admissions made by appellant while under illegal arrest.

In the instant case the Court holds that it was reversible error for the trial judge to admit evidence of fingerprints taken from the accused following an assumedly illegal arrest but during a period of necessary delay between arrest and arraignment. Rule 5 (a) was not held to be violated. Plainly, the rule applied in *Gibson* and adhered to in *Smith*, was disregarded.

In support of its conclusion the Court cites *Upshaw* v. *United States*, 335 U. S. 410 (1948), and *Mallory* v. *United States*, 354 U. S. 449 (1957). But in each of those cases confessions were held inadmissible because of unnecessary delay between arrest (whether legal or illegal) and arraignment. The policy underlying those decisions—to make certain that any confession introduced into evidence is untainted by prolonged detention in the hands of the police—is not applicable to this case because the fingerprints, by the Court's own statement, were obtained "almost immediately after arrest". An incriminating statement obtained shortly after arrest is admissible, since made before the policy against undue delay in arraignment is violated. *United States* v. *Mitchell*, 322 U. S. 65 (1944). *Upshaw* and *Mallory*, therefore, were erroneously deemed to be controlling in this case. Those decisions were not concerned with the problem of the consequences of an illegal arrest.

2. The only other authority cited by the Court was the doctrine that requires suppression of articles seized from the person of the accused upon the occasion of an illegal arrest.

Its opinion creates an unwarranted and unprecedented extension of that doctrine.

In this case nothing was seized from appellant. The fingerprints obtained were not evidence of any crime, but were only the means by which evidence of appellant's involvement in the crime was given probative value. We find no basis in the language of the Fourth Amendment, itself, or in the cases which have construed it, for the suppression of such fingerprints.[2] A fingerprint taken while a person is in police custody, like a photograph, is but a scientific method of establishing who the person is; supplementing the name, address and other information pertaining to identity that were already in the hands of the police.

The Court's extension of the rule of *United States* v. *Di Re*, 332 U. S. 581 (1948), upsets the carefully evolved compromise between society's interest in bringing the criminal to justice and in proscribing illegal police activity. The new rule takes a substantial step in the direction of immunizing from prosecution those whose arrests are illegal and undermines the well settled rule that illegal arrests, standing alone, are of no significance.

3. In any event, there was probable cause for the arrest of appellant. After being informed of an unusually brutal robbery, the police had good reason to believe that a certain automobile was used in the commission of the crime. After investigation they learned that the owner of the car was a person of undetermined address [3] and that he was living in the District of Columbia but was, in violation of the law, driving an automobile with Maryland license plates. Under those circumstances and with a full awareness that it might be well nigh impossible to find appellant because of his suspicious conduct in moving from place to place so often, the police had probable cause to believe that appellant had committed or aided in the commission of the crime. Probable cause for appellant's arrest, made when he appeared at the police sta-

[2] Nor does the Fifth Amendment prohibit the taking of a fingerprint. *United States* v. *Kelly*, 55 F. 2d 67.

[3] They investigated three addresses where he was supposed to have resided (one of which was not even a residence and was the address listed as appellant's home on his owner's permit) and could not locate him.

tion, is found in the composite knowledge of the police force. The opinion in this case erroneously isolates the facts known to the particular police officer who happened to execute the arrest. Cf. *Weise* and *French* v. *United States,* 251 F. 2d 867 (9th Cir. 1958). In any event, the police officer who arrested appellant was aware that appellant was illegally using an automobile in the District of Columbia and was therefore subject to arrest on that basis.

CONCLUSION

Wherefore, it is respectfully suggested that the Court's discretion would most appropriately be exercised by an order of a rehearing en banc.

(s) Oliver Gasch,
OLIVER GASCH,
United States Attorney.

(s) Carl W. Belcher,
CARL W. BELCHER,
Assistant United States Attorney.

(s) Nathan J. Paulson,
NATHAN J. PAULSON,
Assistant United States Attorney.

CERTIFICATE OF GOOD FAITH

It is hereby certified that the petition is presented in good faith and not for delay.

(s) Nathan J. Paulson,
NATHAN J. PAULSON,
Assistant United States Attorney.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition for Rehearing En Banc has been mailed to attorney for appellant, Henry Lincoln Johnson, Jr., Esquire, 626 3d Street NW., Washington, D. C., this 30th day of December 1958.

(s) Nathan J. Paulson,
NATHAN J. PAULSON,
Assistant United States Attorney.

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